PRINCIPLES OF EQUITY

(With the Indian Trusts Act)

BY

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SEVNTH EDITION.

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PREFACE TO THE SEVENTH EDITION.

THIS edition has been thoroughly revised and brought up-to-date so as to answer the normal demands of the students and serve as a ready reference book to the lawyers. The full text of the Indian Trusts Act is also given as usual. Some portion on Mortgages has been entirely re-written.

Last edition of this publication was brought out in 1938. This edition would have been out earlier but for the paper control economy order. That the book has undergone seven editions speaks for its popularity.

Owing to the high cost of Printing and paper, the price of this edition has been temporarily increased.

High Court, Bombay.
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PRINCIPLES OF EQUITY.

" *Equity was originally the revolt of common sense against the pedantry of law and trammels of the feudal system; it became a highly artificial and refined body of legal principles and it is at the present day an amendment and modification of the common law.*"

UNDERHILL.

Origin and development of Equity.

Two co-ordinate systems of law were being administered at the same time by different tribunals in England till the passing of the Judicature Act in 1873. These systems were distinguished as common law and equity. " The common law was the older, being coeval with the rise of justice in England and it was administered in the older Courts, namely, the King's Bench, the Court of Common Pleas, and the Exchequer. Equity was the more modern body of legal doctrine, developed and administered by the Chancellor in the Court of Chancery as supplementary to, and corrective of, the older law."

To sketch a historical outline of the origin and development of the body of rules known as Equity one must begin with the *days of Edward I, who ruled England* at the end of the thirteenth century. The three courts of the realm—the King's Bench, the Court of Common Pleas and the Exchequer—had already been well established. The law formulated, developed and administered by these courts was what is known as the common law. It was based on the common custom of the country.

One of the King's chie ministers was the Chancellor. He presided over the Chancery which was one of the various

secretarial departments. A person who wanted to bring an action in one of the common law Courts had to go to the Chancery and obtain an appropriate writ from the clerks there, whose function it was to draw up and issue the necessary writs. As only particular established writs could be issued from the Chancery, the plaintiff often could not bring his suit before the Courts if he failed to bring his claim within one of the established writs; the result being that many rights could not be enforced and many wrongs remained unredressed. To remedy this defect of the common law a limited power was granted to the Chancery to invent new writs for certain cases (cases which were not quite dissimilar to those for which there were appropriate writs); these were known as writs *in consimili casu.*[1] This change, which was only a partial measure, was brought about by a clause of the Second Statute of Westminster, known as the Statute *in consimili casu.*

The common law was deficient—

Firstly, because remedy was not available in all cases; many wrongs remained unredressed for want of proper writs.

Secondly, because the relief granted by the common law Courts was not always adequate—thus a party could obtain only damages for breach of a contract, but not its specific performance; reliefs such as injunction, accounts, appointment of receiver, etc., were unknown to common law Courts.

Thirdly, the procedure in the common law Courts was defective and unsatisfactory; the procedure in equity was simpler and afforded advantages not obtainable at law.

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1. In consimili casu, consimili debet esse remedium—"In similar cases there should be like remedies."

The equitable jurisdiction in England grew up from the deficiencies of the law and from the inadequacy of the remedies in the prescribed forms to meet the full exigency of the particular case. It was not a usurpation for the purpose of acquiring and exercising power, but a beneficial interposition to correct gross injustice and to redress aggravated and intolerable grievances.[1] Persons who could not get adequate relief owing to the shortcomings of the common law began to present their petitions to the King in Council. The number of petitions thus presented to the king as the fountain of justice, began to grow; it was a very laborious task for the king to cope with, and so in practice the work of hearing these petitions fell on the Chancellor who was in those early days always an ecclesiast and a learned member of the council. In some cases the petitions were made to the king because some relief was sought against the king himself; and in other cases the petitions were made on the ground that the petitioner was infirm or that the petitioner was old or destitute of means or on the other hand that his opponent was a powerful and influential party or a man of great means. As time went on these petitions began to be made to the Chancellor himself. *The various relief granted by the Chancellor and the simple procedure of his Court became very popular.* The procedure adopted by the Chancellor was very simple. The Chancellor, after considering the petition or "bill" as it was termed, used to order the opponent to appear before him and answer the complaint lodged against the opponent; this writ (or summons as we might say) was called "subpœna." The opponent was examined on oath and then the Chancellor gave his judgment deciding questions both of facts and law.

Thus, as early as the reign of Edward I, the Chancellor began to exercise an original and independent jurisdiction as a Court of Equity in contradistinction to a Court of Law. In the time of Edward IV, the process by bill and snbpœna had become the daily practice of the Court. The jurisdiction

1. Story's Equity, P. 25.

of the Chancellor was confirmed by a proclamation of Edward III in A. D. 1319.

The Chancellor's jurisdiction began to grow rapidly, the common law Courts had always refused to take cognizance of fiduciary obligations, of uses and trusts; the Chancellor recognized and enforced these. Another reason why the Chancellor had a free hand in his task of administering equity was *that he was not bound to follow precedents;* nor was he hampered by any rules of procedure. The rapidity with which the Chancellor's jurisdiction was expanding naturally excited the jealousy of the common law Courts and *we find that henceforth the Chancellor was to interfere only when there was no adequate remedy at common law and not on the slightest pretext,* as he was of late wont to do. The Courts of Equity assumed such unbounded jurisdiction of correcting, controlling and moderating the law that it seemed to place the whole rights and property of the community under the arbitrary will of the Judge who acted according to his own notions and conscience, but with a sovereign authority. This invited Seldon's celebrated remarks: "For law we have a measure and know what to trust to. Equity is according to the conscience of him that is Chancellor; as that is larger or narrower, so is equity. It is all one as if they should make the standard for the measure, the Chancellor's foot. What an uncertain measure would this be ! One Chancellor has a long foot; another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience." The jurisdiction of of the Court of Chancery, however, continued to grow and in the reign of Henry VIII, it expanded into an almost boundless jurisdiction under the fostering care of Cardinal Wolsey.

Coming to the sixteenth century, we find that the days of the ecclesiastical chancellors were over with Wolsey, the last of them Famous chancellors such as Ellesmere, Bacon and Coventry began to administer equity under an established set of rules; important doctrines of equity were ably discussed

and principles laid down. This was the period of the great controversy between Ellesmere, who was Lord Chancellor, and Coke, the Chief Justice of James I. James I issued a decree in favour of the Chancery, and as Professor Maitland so ably puts it, "from this time forward Chancery had the upper hand. It did not claim to be superior to the Courts of Law but it could prevent men from going to those Courts, whereas those Courts could not prevent men from going to it." The independence of the Courts of Equity was upheld.

Great chancellors systematized equity and lent dignity and character to this Court; such, among others were Lord Nottingham, "father of equity," Lord Hardwicke and Lord Eldon. Of Nottingham it has been said that he laid *the foundation of the system of definite rules which we now know as equity*; Hardwicke carried on the task of systematizing equity; during the twenty years that he remained on the woolsack,[1] "he examined and formulated nearly all the rules of equity, transforming it from a haphazard collection of rules, some well developed and others hardly yet perceived, into a true and definite system of jurisprudence." Eldon completed the task. Equity which in its infancy was fragmentary had now developed into a harmonious system. Precedents were to be followed and reports of cases in Chancery began regularly to be made. Equity was now being administered on established principles and recorded precedents.

The development of the equitable jurisdiction had been, indeed very great. By the end of the eighteenth century almost all the most famous rules of equity had been formulated and were being administered in the Chancery Courts; the Chancellor was assisted by the Master of the Rolls, Vice-Chancellors and Lord Justices of Appeal in Chancery. When Eldon (1801-27) reached the woolsack, equity ceased to expand. After Eldon the period of 'legislative interference' begins. The Chancery Amendment Act

1 Woolsack.—The seat on which the Lord Chancellor sits in his capacity of Speaker of the House of Lords.

of 1858, better known as **Lord Cairn's Act**, was passed, which conferred on the Chancery Courts the power of awarding damages—a power which was till then exercised only by the comman law Courts. Other equally important changes were brought about by the Common Law Procedure Acts, whereby certain equity powers were given to the common law Courts; such for instance, was the power to grant injunctions in certain cases.

But these were half measures, for, the curious spectacle of two systems of law being administered at the same time by different tribunals still continued. Complete reform came with the Judicature Acts[1] of 1873 and 1875. The fusion of Law and Equity took place; the old Common Law and Chancery Courts were abolished. One Supremè Court of Judicature was created where the same judges began to administer both Law and equity.

1 See Chapter II.

CHAPTER I.

GENERAL.

" *Now equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the vigour, hardness and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak . . . , and defends the law from crafty evasions, delusions and new subtleties invented and contrived to evade and delude the common law, whereby such as have undoubted rights are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Epuity therefore does not destroy the law, nor create it, but assists it.* "

PER LORD TALBOT in *Dudley* v. *Dudley*.

" *Chancery is ordained to supply the law and not to subvert the law.* "

LORD BACON.

What is Equity.

Equity in its broad and popular sense signifies equality, justice and fairness; that a man shall do unto others as he would be done by. It is a synonym for natural justice. It is neither possible nor convenient for equity to cover the whole field of natural justice. Thus unkindness and ingratitude or other moral wrongs are not provided for by equity.

It is not in this sense, however, that equity is to be understood by us. We have to take it in its limited and technical sense in which it means **the body of rules formulated and administered by the Court of chancery to supplement the rules and procedure**

of the common law. Equity came forward to give more ample and distributive relief in cases of hardship—cases where the common law failed either owing to the inflexibility of its rules or because of its defective procedure. It has been said that it was the business of a court of equity to abate the rigour of the common law. But this from its very nature it could not do in every case. Thus for instance a court of equity had no power to interfere in the case of a bond creditor whose debtor devised away his real estate, nor could it give relief in "every matter that was inconsistent with the design of the legislator, or was contrary to natural justice." And it has been remarked that a court of equity interpreted a law according to the spirit of the law and not according to the strictness of the letter. But so did a court of law. Both were equally bound, and professed to interpret statutes according to the true intent of the legislature, so that equity in this connection meant nothing more than the sound interpretation of law. As observed by Wooddenson, "equity was a judicial interpretation of laws which, presupposing the legislator to have intended what was just and right, pursued and effectuated that intention." It is the duty of every court of justice, whether of law or equity, to consult the intention of the legislature, and in the discharge of this duty, a court of equity is not invested with a larger or more liberal discretion than a court of law.

Equity and Common Law.

The body of rules which grew up by the side of the original law and which we understand as equity does not constitute a complete, self-sufficient system. Maitland's fundamental postulate is that equity is not in conflict with law. At every point it presupposes a great deal of law. Equity without common law would be unthinkable, e. g., it is meaningless for equity to say that A holds Blackacre on trust for B, unless it first admits that A is the legal owner of Blackacre Far from being in conflict with law, *equity is supplementary*.

law consisting of rules designed to meet the shortcomings of the common law and to relieve against its abuse. Equity without common law would be an impossibility since it professes to administer justice according to the principles of the law of the realm; that it is so is clear from two of the important doctrines of the Chancery Courts, viz., *Equity follows the Law, and Where Equities are equal the Law will prevail.* Equity never aimed at encroaching upon the domain of law, nor did it supersede the established rules of law. The real difference between law and equity was more of degree and form than anything else, for a court of equity was bound by rules of law as completely as any common law court was.

Law and equity, it was said by Lord Ellesmere, have both the same end, which is to do right, and in some matters especially, in regard to titles to equitable estates, equity followed the law implicitly. Where it differs from the law, this was in order to moderate its rigour; to supply its omissions; to assist the legal remedy; or to relieve against the evasion of the law, or the abuse of the legal right. Courts of equity, in the exercise of their jurisdiction may, in a general sense, be said to have differed from common law, in the modes of trial, in the modes of proof, and in the modes of relief.

CHAPTER II.

THE FUSION OF LAW AND EQUITY: THE JUDICATURE ACTS.

PRIOR to the passing of the Judicature Acts *two distinct systems of law were being administered in England by different courts side by side.* The courts of common law recognized and enforced only *legal rights and remedies* whereas the Chancery Courts interfered only when equitable rights or interests were involved and granted the reliefs that were peculiar to those courts ; thus damages only could be had for a breach of a contract in a common law court and if a party wanted specific performance of a contract he had to bring his action in one of the Chancery Courts. The procedure adopted in these courts was also different. The result of all this was that the litigant was put to much inconvenience, delay and expense. Partial remedy was provided for, as we have already seen, by the Chancery Amendment Act (Lord Cairn's Act) and the Common Law Procedure Acts.

Before the Judicature Acts the jurisdiction of equity was classified as Exclusive, Concurrent and Auxiliary.

(*a*) **Exclusive**, i.e., exclusive of common law courts. This was when the common law courts did not recognize the equitable right or interest and failed to give relief, e. *g*., Trusts, Administration of Estate, etc.

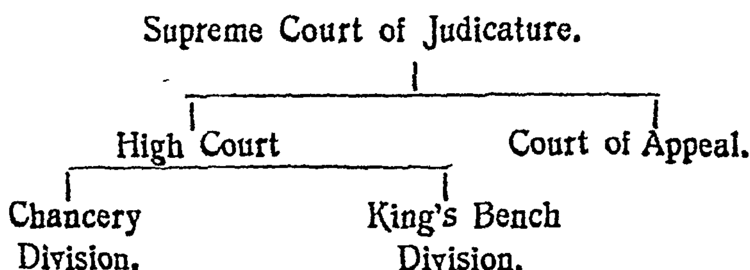
(*b*) **Concurrent.**—In its concurrent jurisdiction the Court of Chancery dealt with cases in which the common *law courts recognized the right but did not grant an adequate remedy and the* remedy granted at equity was a better one, e. g., Specific Performance and Injunctions.

(*c*) **Auxiliary.**—In its auxiliary jurisdiction all that the equity court did was to aid a party to a common law action by making certain orders for his benefit-

orders which the common law courts refused to make e, g., *orders for discovery of documents*, examination of witnesses *de bene esse*, etc.

The two distinct and rival systems of law continued to be administered simultaneously till the passing of the Judicature Acts of 1873 and 1875 whereby the so-called fusion of law and equity took place. The old courts of Chancery and of the common law were abolished. Instead of these different courts administering two distinct systems, one Supreme Court of Judicature was created. This Supreme Court has to administer both law and equity.

The following table shows the divisions of the Supreme Court :—



A new and uniform procedure was established which incorporated the best rules of the procedures of the two old systems. In every civil case, law and equity have to be administered concurrently; but then in case of conflict of rules of common law and equity with reference to the *same matter*, rules of equity prevail.

The main object of the Judicature Acts was to assimilate the transaction of equity business and common law business by different courts of judicature ; it has been sometimes inaccurately called "the fusion of law and equity" ; it was in fact the vesting in one tribunal the administration of law and equity in every cause, action or dispute which should come before that tribunal.[1] The Judicature Acts did not fuse together law and equity ; they only fused together

1 Per Jessel, M.R., in salt V. Cooper, (1880) 16Ch. D. 544.

the courts which administered law with the courts which administered equity. The Judicature Acts have practically done away with the auxiliary jurisdiction and converted the exclusive jurisdiction into a concurrent jurisdiction since every court in which a suit may be brought is now competent to grant all necessary relief, be it legal or equitable or both. *The court is not now a court of law or a court of equity, but it is a court of complete jurisdiction*, and if there were a variance between what before the Judicature Acts a court of law and a court of equity would have done, the rule of the court of equity must now prevail.[1]

The High Court at present is divided into the King's Bench Division and the Chancery Division; but the divisions are of the same High Court and made only for the convenient administration of justice. Rights and remedies, whether legal or equitable, are now recognized and enforced in all the courts for, as already observed, the Supreme Court was created to administer both law and equity. The work of the High Court is distributed between the two divisions, but this is for the sake of convenience only; thus certain matters[2] are assigned primarily to the Chancery Division:—

(1) The administration of the estates of deceased person.
(2) Dissolution of partnership and partnership accounts.
(3) Redemption or foreclosure of mortgages.
(4) Raising of portions or other charges on land.
(5) Sale and distribution of the proceeds of property subject to a lien or charge.
(6) Execution of trusts, charitable or private.
(7) Ratification or setting aside or cancellation of deeds or other written instruments.
(8) Specific performance of contract between vendors and purchasers of real estates including contracts for leases.

1 Pugh v. Heath, (1882) 7 A. C. 235.
2 S. 56, Judicature Act, 1925.

(9) Partition or sale of real estates.

(10) Wardship of infants and the care of their estates.

The effect *of the Judicature Acts was to abolish the two rival jurisdictions, and to create one court with power to administer both law and equity.* **Law and equity continue to flow side by side aiding and supplementing each other. The so-called fusion of law and equity is a fusion not of principles but of the administration of the two rival systems.** Yet, notwithstanding the fusion of law and equity which has by the Judicature Acts been in a great measure effected, the distinction between the two systems must still, for many purposes, be regarded. And further than that, notwithstanding their present concurrent *administration*, the distinction remains substantial and real. The differences between legal and equitable estates and interests and principles continue to exist, and to produce most important results; so that if we were to cease to indicate the contrast by the terms " legal " and " equitable, " we should have to invent others for the purpose.[1] The Judicature Acts have not abolished the distinction between legal and equitable interests; what they did was to enable the same High Court to administer both legal and equitable remedies.

By a bill of sale a jeweller, for valuable consideration, assigned to plaintiff his after-acquired stock-in-trade subject to a proviso for redemption; before plaintiff took possession of the after-acquired stock-in-trade, the jeweller pledged a portion of it with defendant, who had no notice of plaintiff's bill of sale. It was held that plaintiff had an equitable title to the after-acquired property, but the legal property was in the jeweller from whom defendant derived a legal interest which, in the absence of any notice received by the defendant of the prior equity, was to be preferred; and therefore defendant was entitled to retain the stock–in–trade pledged with him as against the plaintiff. This case clearly illustrates

1 *Maitland, Equity Jurisprudence, P. 3.*

that the Judicature Acts did not enact that legal and equitable rights should be treated as identical but what they did was that thereafter the Courts were enabled to administer both legal and equitable principles.[1]

Recent legislation in England.—The new Consolidated Acts passed in 1925, such as (1) The Law of Property Act 1925, (2) The Settled Land Act, 1925, and (3) The Trustee Act, 1925, have undoubtedly effected sweeping and revolutionary changes in the old real property law. They also remove many of the anomalies of the old property law. The object of the new laws was to assimilate and simplify the law relating to real and personal property, " so far as the essentially different natures of immovable and movable property will permit. " The new law came into operation on the 1 st Janunry 1926. It does not interfere with rights acquired under the old law before 1926.

In dealing with the new law of property it must be noted that it makes very few substantial variations or alterations in the main principles of equity. Most of it deals with the law of property and the practice of conveyancing. Further, the new law applies only to England so that its operation is not extended to countries like Scotland, Ireland and India where equity will continue to be administered without being much affected by it.

The law of property has been codified in six statutes:—

(1) The Law of Property Act, 1925.
(2) The Settled Land Act, 1925.
(3) The Land Registration Act, 1925.
(4) The Land Charges Act, 1925.
(5) The Administration of Estates Act, 1925.
(6) The Trustee Act. 1925.

It is not possible, nor is it necessary to incorporate all the changes effected by the new legislation in this book. Im-

1 Per Cotton. L. J., in Joseph v. Lyons, (1884) 15 Q. B. D., 280.

portant changes made by new laws have been pointed out wherever they relate to the subjects dealt with in the following pages.

Equity in India.—*The Supreme Courts in India* were made by the charters courts of equity and were given an equitable jurisdiction corresponding to that of the Court of Chancery in England. The High Courts of Bombay, Madras and Calcutta have succeeded to the jurisdiction conferred upon their predecessors.[1] In India both common law and equity Jurisdictions are combined in one court which acts according to equity, justice and good conscience in the absence of specific rules of law. [2]

Much of the substantive civil law in India is to be found in the various Acts of the legislature, viz., Contract Act, Sale of Goods Act, Partnership Act, Negotiable Instruments Act, Transfer of Property Act, Trusts Act, Easements Act, etc. The bulk of the adjective law dealing with civil matters has been codified in the Civil Procedure Code. The Letters Patent of the various High Courts and the Acts conferring jurisdiction on the various courts in India *make it abundantly clear that in the absence of specific law and usage the courts are to act on principles of justice, equity and good conscience.* The principles of equity as applied to the practice of the courts in England should be observed in the courts of British India in cases, in which there is no law extant, which laid down a different procedure.[3] S. 151 of the Civil Procedure Code saves in matters relating to procedure the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The Code does not affect the power and duty of the court, in cases where no specific rule exists, to act according to equity, justice and good conscience, though in the exercise of such

1. See. s, 11, Indian. High Courts Act, 1861, Cl. 18, Letters Patent; 1862, Cl 19, Letters Patent, 1865, and ss. 106 and 130 Government of India Act, 1915. See also Hatimbhai v. Framroze, 51 Bom. 537.
2. Watson v. Ramchand, (1891) 18 Cal 10.
3. Nabakumarsingh Dudhuria v. Fakh singh Nahar, (1934) 61 Cal. 986.

power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the legislature.[1] Thus where rights are conferred by the Code and no provision is made for a particular fact or facts, the Courts ought to apply the provisions which are the nearest in point–with such modifications as may be necessary. The object of sec. 151 is to give such powers to courts and to prevent a failure of justice[1A] So that where circumstances require it, the court has always acted upon the assumption of the possession of an inherent power to act *ex debito justitiœ* and to do that real and substantial justice for the administration of which it alone exists.[1B]

The expression "justice, equity and good conscience" has generally been interpreted to mean the rules of English law so far as they are applicable to Indian society and circumstances. The courts[2] in India will not however, apply rules of English law which, though well established and binding on English courts, are yet so special in their nature and origin as to be inapplicable to the different circumstances of this country.[3] It is true that in the absence of specific rules of law the practice of the English equity courts would be followed in India with necessary modifications[4] but the reference to those courts must not be for the purpose of introducing special or peculiar doctrines of English law, but for the purpose of elucidating the principles of equity and good conscience and of giving systematic and uniform effect to them.[5]

1. Hukumchand v. Kamlanand, (1906) 33 Cal 931. 1.a.47 Bom. L R. 104

1b In Hukumchand v. Kamlanand, supra, at P.932 are stated a number of instances of the exercise of the inherent jurisdiction of the Court to do justice beween the parties—also see Pransukhram v. Bai Ladkor, (1899) 23 Bom. 655; Kadala Reddi v. Narsi, (1901) 24 Mad. 504.

2. Waghela v. Shekh Masludin, (1887) 11 Bom. 551, 561, (P C.).

3. Mithibai v. Limji, (1881) 5 Bom. 506. 530, 531.

4. Mancharsha v. Kamrunisa Begam, 5 Bom. H, C. (A.C. J,) 109, Shapurji v Dossabhoy, 30 Bom. 359, 362.

5. Shapurji v. Dossabhoy, 30 Bom. 359; also see Hirabai v. Dinshaw, 51 Bom. 167, 176 where Marten, C. J. has stated a number of instances where highy technical rules of English law have been held inapplicable in India

CHAPTER III.

GENERAL MAXIMS OF EQUITY.

" *Maxims are the proverbs of the law. They have the same merits and defects as other proverbs, being brief and pithy statements of partial truths. They express general principles without the necessary qualifications and exceptions, and they are therefore much too absolute to be taken as trustworthy guides to the law. Yet they are not without their uses. False and misleading when literally read, these established formulae provide useful means for the expression of leading doctrines of the law in a form which is at the same time brief and intelligible.*"

SALMOND.

WE have seen that equity was not a complete, self-sufficient system ; but the relief that it granted was not based on any arbitrary rules. There were certain general principles on which the Court of Chancery exercised its jurisdiction. These are known as Maxims of Equity.

(1) **Equity will not suffer a wrong to be without a remedy.**—The maxim *ubi jus ibi remedium* means that where there is a right there is a remedy. *Thus it has been said that if the law gives a man a right he must have* " *a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it* and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. "[1] This is the basis of a large part of equity jurisprudence. But this has certain limitations, viz., that it applies only to rights or wrongs which are *capable of being judicially noticed and enforced.* and not to mere moral rights and wrongs.

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1 Ashby v. White, I Sm. L. C. 11th Ed., p. 240.

This maxim was the principle upon which the Court of Chancery enforced trusts and uses. Trusts were practically unknown to the common law. Similarly, the Court of Chancery ordered 'Discovery' which the common law courts could not. If a trustee committed breach of trust and there was no remedy, certainly it was a wrong without a remedy. Similarly, if the defendant had an important document in his possession and he could not be ordered to disclose it, certainly this was a wrong without a remedy, Equity intervened, however, on the basis of this maxim. Thus, for instance, a plaintiff could have a receiver appointed by way of equitable execution in cases where the judgment-debtor had only an equitable interest in the property. Now under s. 45 of the Judicature Act, 1925, a receiver may be appointed even at law whenever it is 'just and convenient' to do so.[1]

(2) **Equity follows the law.**—Where a rule, either of the common or statute *law, is direct and governs the case with all its circumstances*, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.[2] Equity adopts rules of common law and acts in analogy to these rules whenever such an analogy exists; in some cases equity follows the rules of law implicitly, and in some cases relieves against the abuses thereof *but in no case does it contradict or overturn the principles of law.*

This maxim may be considered in relation to legal estates, rights and interests and in relation to equitable estates and rights. As regards legal estates, rights and interests, *equity was and is strictly bound by the rules of law and has no discretiou to deviate*

1 Also see O. 40, Civil Procedure Code.

2 Story's Equity Jurisprudence, p. 42.

from law. Thus in matters of descent, according to the rule of primogeniture, when a person dies intestate, the eldest son is entitled to the whole real estate to the exclusion of younger sons and daughters. Equity in such cases followed the law. i. e., adopted the legal rules and would not grant relief to the other children on whom the rule worked great hardship.

As regards equitable estates and interests, equity though not strictly speaking bound by the rules of law, yet acted and acts in analogy to those rules wherever an analogy exists. The Law of Property Act, 1925, has with the exception of (1) estates in fee simple absolute in possession and (2) terms of years absolute, which are the only two possible legal estates, the effect of converting the estates existing at the end of 1925 into equitable estates. But these equitable estates have the same incidents as the legal estates. Thus equitable estates are guided by the same rules of descent as legal estates, and rules of law are followed by courts of equity when deciding titles to equitable estates. Again, rules regarding the construction of covenants are the same in equity as at law. In construing words of limitation, equity follows the law. In short, it supplements and assists it only; thus in executed trusts limitations are construed in the same manner as similar limitations would be construed in a court of common law; but it is not so in case of executory trusts where regard is to be had to the presumable intent or to the words used; so far as statutes of limitation are concerned, though the court of equity is not within their words it is within the spirit of these and it never exceeds the rules. All these go to lead to the one explanation of the maxim that equity though going far ahead of law,

never goes in opposition to established principles, and in that sense is controlled by law.[1]

(3) **Where equities are equal, the law will prevail.**

(4) **Where there are equal equities the first in time shall prevail** (equities rank in order of time).

It is convenient to treat these two maxims together as they deal with questions of priority. A person can mortgage his property to, say, A, B, C, D, and so on. In such a case, and in similar cases where the legal estate in the property resides in A and the equitable estate in the same property resides in B, the question arises as to who has the prior claim to the property. It may be, in certain cases, that both A and B have equitable estate in the property, The question arises as to whose claim must be first satisfied. These two maxims lay down in a nutshell the **doctrine of priority.** S. 48 of the Transfer of Property Act is a statement of the maxim *qui prior est tempore, potior est jure*[2], thus where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist together, each later created right shall be subject to the rights previously created. This priority, however, may be lost through fraud, misrepresentation or gross neglect of the prior encumbrancer.[3]

The general rule is that:—

(1) A Person in possession of the legal estate has priority over a person having only equitable estate. This is so because equity follows the law.

(2) If neither claimant has the legal estate, then as between equitable interests, the first in time prevails.

Illustration.—A trustee in breach of trust purchased land with the trust moneys and took the conveyance in the name of B. B created a legal mortgage in favour of X and then an equitable mortgage in favour of Y. The question

1. Lofus v. Maw 3 Gif., 592, Alderson v. Madison, 8 A. C., 497.
2. " He has the better title who was first in law. "
3. S. 78, Transfer of Property Act.

arises as to who has priority : X or Y or the beneficiaries under the trust ? (Note : Beneficiaries have an equitable estate in trust property, the legal estate remaining in the trustee.) X will have priority over Y, because X has the legal estate. But the beneficiaries will have priority over Y, for both of them have only equitable estate in the property, and whenever the equities are equal the first in time prevails. (*Cave* v. *Cave* (1880) 15 Ch. D. 639.)

There are three possible combinations of circumstances in which questions of priority might arise:—

1. Prior equitable and subsequent legal estate.

A agrees to sell property X to B. In breach of this contract, A sells the property to C and conveys it to him. Here C has the legal estate and B has the equitable estate in property X. The rule of equity is that, if C acquired the legal estate *bona fide for value without notice of B's equitable* interest, then C is entitled to priority over B. In order to obtain this priority, C must show that he was a purchaser for valuable consideration and without notice of B's interest. It must be a case of **bona fide purchase for value without notice.**

The following are the requisites of such a defence;—

(1) C must have *obtained the legal estate*, or it must be vested in some person on his behalf.

(2) C must have *given consideration* for the property. If C is a mere volunteer, e g, a mere donee, he cannot claim priority over B.

(3) C *must have no notice of B's* equitable interest.

Priority under the new Act: Rules protecting a purchaser for value against prior interests.—Under the new law C in the above case will take free from B's equitable interest even if he had notice of it unless it is registered as a land charge. [1]

1 S. 199, Law of Property Act, 1925.

I. S. 199 of the Law of Property Act, it may be observed, very vitally affects the rights of a person claiming a prior equitable title. That section evinces a clear tendency on the part of the legislature to curtail to a considerable extent the hitherto recognized equitable doctrine of notice. Under that section the *mere* existence of certain prior interests—capable of registration under the Land Charges Act—though known to a person who subsequently acquires for value a legal title will not in the absence of fraud affect the latter with notice unless those prior interests have been registered under the Land Charges Act. Nor will the purchaser be affected by notice of any instrument which is declared to be void or unenforceable against him by that Act or any prior Act which it replaces, as a result of non-registation thereof.

II. S. 2 of the Law of Property Act, 1925, gives further protection to a purchaser for value though having notice of certain other prior equitable interests. It lays down that notice of any equitable interest affecting the estate will not affect the purchaser *if the legal estate is conveyed* (*a*) under the Settled Land Act or (*b*) by *trustees* under a trust for sale and the purchase-money is paid in both cases to at least *two* trustees or a trust corporation, or if the conveyance is made (*c*) by a mortgagee in exercise of his powers and the money is paid to the mortgagee or his personal representative, or lastly if the conveyance is made (*d*) under an order of the court and the money is paid into the court. In respect of land not subject to a trust for sale, the estate owner *may* dispose of his estate to trustees upon a trust for sale, and then any conveyance made after 1925 will overreach the equitable interest or power to which the estate is subject, if the trustees are two or more individuals approved or appointed by the court or a trust corporation. Under the Settled Land Act, a person of full age beneficially entitled to a legal estate subject to equitable interests and powers, may make the land settled land and thereby overreach the equitable interests. When the estate is dealt with in the last two ways there

are certain equitable interests which cannot be overreached, e. g., restrictive covenants, equitable easements, estate contracts, etc.

III. A *bona fide* purchaser dealing with the mortgagee or with the martgagor, will not be affected by notice of equities or trust affecting the mortgage-money.[1]

The doctrine of Notice.—A person is said to have notice of a fact when he actually knows the fact or when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it; or when information of the fact is given to or obtained by his agent *in the course of the business* transacted by him for his principal; any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to, or obtained by, the principal.[2]

In England the law as to notice is now stated in s. 199 of the Law of Property Act, 1925. Under that section, a purchaser or mortgagee will be affected by notice of an instrument or fact if it is within his own knowledge, or if it has come to the knowledge of his agent in the course of the same transaction, or if it would have come to his knowledge or the knowledge of his agent if proper inquiries had been made. In the former case, it is called '*actual notice*'; in the latter case it is called '*constructive notice.*' The effect of notice is the same, whether it be actual or constructive.. There would be constructive notice of an instrument or a fact if knowledge regarding it—

(*a*) would have come to the purchaser indirectly as the result of reasonable inquiries and inspections;

1. S. 113, Law of Property Act.
2. See s. 3. Transfer of Property Act, and s. 229, Indian Contract Act

(*b*) comes directly to his counsel, solicitor, agent, and in the *same* transaction; or

(*c*) would have come to his agent *as such* indirectly as the result of reasonable inquiries and inspections such as would be made by an ordinary prudent man.[1]

The changes brought about by the recent legislation in England curtailing the extent of the equitable doctrine of notice in England have already been discussed at above. A striking instance of the difference created between the English and Indian law on the subject as a result of s. 13 of the Land Charges Act of 1925 may be noted. A agrees to sell an immovable property to B. C, with the knowledge of the agreement between A and B, purchases the property from A and gets in the legal estate by properly getting the conveyance registered. The instrument containing A's agreement with B was not registered. In England, as already pointed out, C will have a priority over B. In India it will not be so for C will be affected with notice of B's right.[2]

It may be observed that the rules as to notice as applied in India do not differ from the corresponding English rules on the subject except in the case already mentioned. The question of notice very often arises in connection with mortgages, as also where a person claims to be a purchaser of a legal estate for value without notice.

Actual notice.

(*a*) To constitute a binding notice, actual notice must be 'definite,' i. e., it must be given by a person interested in the thing in respect of which the notice is issued. It must

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1. In re Cousins, 31 Ch. D. 671; Northern Insuraco Co. v. Whipp, 26 Ch. 482; Hewit v. Loosemore, 9 Hare 448, Leneve v. Leneve, 2 W. T. 175.

2. S. 40, Transfer of Property Act. Desaibhai v, Ishwar Jeshing, (1920) 44 Bom. 586; Gangaram v Laxman, (1916) 40 Bom. 498, 502; Chander Nath Roy v. Bhoyrub Chunder Surma Roy. [1883] 10 Cal. 250; Kadar v. Ismail, [1886] 9 Mad. 119; Kishan Lal v. Ganga Ram, [1890] 13 All. 28.

have been regularly and formally communicated to him; mere vague reports of strangers do not amount to actual notice. A mere general assertion of title by some other person is not actual notice of such other's title unless it is such as to operate upon the mind of any person of business and make him act with reference to it.[1]

(*b*) The notice must be given in the same transaction or in the course of the negotiations.

(*c*) It must be given to the person in the character in which such notice must affect him and not in any other character.

It may be verbal or written except when it is required by any law to be in writing.

Constructive notice has been described as consisting in those circumstances under which the court concludes either that notice must be imputed on grounds of public policy to an innocent person or that the party has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud and which, therefore, in the common interest of society, should in its consequences be as equivalent to actual notice.

When a person is proved to have had a knowledge of certain facts or to have been in a position, the reasonable consequence of which knowledge or position would be that he would have been led to make further inquiry which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. For there may be such wilful negligence in abstaining from inquiry into facts which would convey, as may properly be held to have, the consequences of notice actually obtained. But if there is not actual notice and no wilful or fraudulent turning away from an inquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent

1. Agra Bank v. Barry, L. R. 7 H. L. 135.

mind, then the doctrine of constructive notice ought not to be applied.[1]

(i) The doctrine is founded upon the rule which discountenances fraud of all kinds as affecting priorties.

(ii) If the circumstances are such as to put the person on inquiry, the fact that the circumstances are such that no amount of inquiry would have disclosed the interest would be no defence.

(iii) The abstention from inquiry or search must be such as to show want of *bona fides* or wilful blindness indicating a fraudulent design.

The following propositions may be noted:—

(1) Notice of a deed is notice of its contents, where the deeds might have been inspected; but not where there is no duty to inspect.[2] If one has notice of a deed and a fair opportunity of examining it, he is fixed with constructive notice of all the instruments which his examination of the deed would have brought to his knowledge.[3]

It has been held, on this principle, that notice that a property is encumbered is notice of the extent and particulars of the charge. Where a purchaser cannot make out his title, but through a deed which leads to a fact, he will be affected with notice of that fact. A purchaser, therefore, who comes in under a document in which a trust is mentioned, must take notice of it at his peril. Similarly, notice that a property is leased is notice of all the contents of the lease. On August 30, 1894, C agreed to let for three years to S, certain premises at a fixed yearly rent " with the option of renewal. " In July 1896 P surchased the prenises but did not come to know of the renewal clause till early in 1897. In a suit for specific performance of the agreement to renew by S it was held that P must be fixed with

1 Doorga Narain v. Baney Mahadub, 7 Cal. 201; Manji v. Hoorbai, 35 Bom. 348.

2 Ward, (1903) 2 Ch. 653; Jugal v. Kirtichandar, 21 Cal. 116.

3 Biscoe v. Earl of Banbury. I, Cas. in Ch., 287.

notice of the contents of the agreement with S.[1] But when "there is no notice of the property being in any way affected and there is no *fraudulent* 'turning away' from the knowledge of facts which the *res gestæ* would suggest to a prudent man, the purchaser is in equity said to be *bona fide* without notice." There is a distinction between mere want of caution and fraudulent and wilful blindess to plain facts.

(2) A lessee is similarly fixed with constructive notice of the lessor's title; the more so if he purposely avoids inquiry or neglects it.[2]

(3) The fact of a third party being in possession puts one dealing with the property on inquiry as to the nature and extent of that occupier's interest. The failure to pursue inquiry affects the defaulting purchaser with notice of the title, if any, under which the possession is enjoyed, and of a contract which he may have entered into for the purchase of property.[3] The newly added Explanation II to the definition of notice in s. 3 of the Transfer of Property Act provides that a person dealing with any immovable property shall be deemed to have notice of the title of any person who, for the time being, is in actual possession thereof.

(4) Notice to an agent is notice to his principal. To affect the principal with notice the following things are essential:— (*a*) The agent must have received the notice during the agency. (*b*) The knowledge must come to him as agent. (*c*) It must be in the same transaction. (*d*) It must be material to the transaction. (*e*) It must not have been fraudulently and collusively withheld from the principal. Under the newly added Explanation III to the definition of notice in s. 3 of the Transfer of Property Act, a person

1 Lewis v. Stephenson, (1898) 67 L. J. Q B. 296.

2 Patman v. Harland, 27 Ch. D. 335.

3 Daniels v. Davison, 18 Ves. 249; Hormusji v. Mankuarbai, 12 Bom. H C. R. 26, Kondiba v. Nana, 5 Bom. L. R. 269; Tejudin v. Govind, 5 Bom, L. R. 144, 158; Vinayakrao v. Gyanoba, 23 Bom. L. R. 1062.

shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material, provided that if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

(5) Notice that title-deeds are in possession of another may constitute notice of any claim that other may have; thus a legal mortgagee or purchaser who has not obtained the deeds, will, if he has made no inquiry for them,[1] be postponed to a prior equitable estate or a subsequent equitable owner who uses due diligence; but not so if he has made proper inquiries and received reasonable excuse for their non-production or non-delivery.[2] S. 78 of the Transfer of Property Act, which deals with the question of priority in India in case of mortgages, lays down that where through the fraud, misrepresenatation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

(6) *Registration* amounting to notice ; see notes, P. 29, *infra.*

Persons acquiring interest from a *bona fide* purchaser for value without notice.

A sells to B. Then A again sells to C who has no notice of the sale to B. C again sells to D who has notice of the sale to B. Here, C acquries legal estate for value without notice and is clearly entitled to priority over B. What is to be noted is that D also has priority over B, though D has notice. The reason is that D is allowed to shelter him-self under the legal estate of C[3].

1 Oliver v. Hintson. (1899) 2 Ch. 26.

2 Birch v. Ellowes, 2 Anstr. 427; Agra Bank v. Barry. L. R. 7 H.L. 197.

3 Brandlyn v. Ord, (1738) 1 Atk. 571.

The reason of the rule of equity, that a purchaser of property, though for valuable consideration, and taking the legal estate, yet with notice of a prior encumbrance, purchases subject to such encumbrance, is that such purchaser is acting *mala fide*, in taking away the right of the prior encumbrancer by getting the legal estate while knowing that a prior purchaser has the right to it. But a purchaser for valuable consideration, without notice of the prior right of a third person, is not guilty of, or party to, a fraud upon the rights of a prior purchaser. The courts of equity, therefore, will not interfere with his right to the possession, enjoyment and disposal of the property; and though subsequently to his purchase, he may become aware of the prior encumbrance, yet he has the right to convey to a subsequent purchaser, who at the time of such subsequent conveyance has notice of the prior right of the third person; and such subsequent purchaser will take the property free from the encumbrance, for neither is he guilty of any fraud, in accepting what his vendor had a right to convey, nor would the *bona fide* purchaser without notice be able, otherwise freely and completely to dispose of the property which he innocently acquired. On the same principles, any subsequent purchaser, however remote, though having notice, must be protected.

Effect of registration.—The High Courts in India have held different opinions on the point whether registration by itself amounts to notice. Thus the Bombay and Allahabad High Courts held that registration was, of itself, good notice to subsequent purchasers or encumbrancers.[1] The Madras and Calcutta High Courts held the contrary opinion, that registration was not, of itself, a sufficient notice.[2] Nor did the Privy Council[3] express any decisive opinion on the

1 Laxmandas v. Dasrat, 6 Bom. 168 (F.B.); Tatyarao v. Puttappa, 12 Bom. L. R 940; Matadin v. Kazim Hossain, 13 All 432 (F.B.) Janki Prasad v. Kishen Dutt, 16 All. 478 (F.B.)

2 Doorga v. Baney Madhut, 7 Cal. 199; Joshua v. Alliance Bank of Simla, 22 Cal 185. Raja Ram v. Krishnasami, 16 Mad. 301.

3 Tilakdhari v. Khedanlal, 22 Bom. L. R. 319; 48 Cal. I.

point. It laid down that registration does not *per se* operate as notice, and the question whether registration is or is not notice, by itself, depends upon the facts and circumstances of each case, upon the degree of care and caution which an ordinary prudent man would naturally take for the protection of his interest by a search into the register; that notice cannot be imputed from the mere fact that a document is to be found upon the Indian register of deeds. In India, the system of registration of instruments relating to immovable property generally prevails, and therefore recently the legislature has deemed it necessary to add Explanation I to the definition of notice in s. 3 of the Transfer of Property Act, making it clear that registration of an instrument relating to immovable property amounts to notice of the instrument from the date of registration. In England now under ss. 197 and 198 of the Law of Property Act, 1925, registration constitutes notice to all persons and for all purposes.

II. Prior legal and subsequent equitable estate.

A mortgages certain property to B. Then A gives an equitable mortgage of the same property to C. Here, B has priority over C. But if B's conduct after he acquired the legal estate has in any way contributed to the fraud which led to the creation of C's equitable estate, then B forfeits his priority and C is entitled to priority over B. Such a case usually arises when the legal mortgagee does not obtain the title-deeds either fraudulently or negligently and an equitable interest is created because of the title-deeds remaining in the hands of the mortgagor.[1]

In *Northern Counties of England Fire Insurance Co. v. Whipp*,[2] the law on the subject was thus stated:—That the court will postpone a legal mortgage to a subsequent equitable security: (1) where the legal mortgagee has assisted in

1. Walker v. Linom, (1907) 2 Ch. 104, 114.

2. [1884] 26 Ch. D. 482; Worthington v. Morgan, 16 Sim. 547; Clarke v. Palmer, 21 Ch. D. 124; also see National Provincial Bank of England v. Grierson, [1913] 2 Ch. D, 18.

or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title-deeds may be sufficient evidence, where such conduct cannot otherwise be explained, or (2) where the legal mortgagee has made the mortgagor his agent with authority to raise money and the security given for raising such money has by misconduct of the agent been represented as the first estate. But the court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee. Mere negligence on the part of the legal mortgagee will not affect his rights. His rights will be postponed only if he has been guilty of fraud or negligence so gross as to render it unjust to allow him to retain his priority.[1]

S. 78 of the Transfer of Property Act contains a similar rule. Where through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee. Thus neglect to recover title-deeds by a vendor from a vendee, who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself when the vendor has full notice that the vendee is impecunious and a bad paymaster and thereby the vendee is enabled to obtain a second mortgage on the property by deposit of title- deeds, is gross and culpable negligence which postpones the prior mortgagee.[2]

III. Two equitable claims.

As between persons having equitable interests only, the *prima facie* rule is that the person whose equitabe right in the property was created first will have priority over the per-

1. Oliver v. Hinton, (1899) 2 Ch. 264; Grierson v. National Provincial Bank, [1913] 2 Ch. 18; Walker v. Linom, [1907] 2 Ch. 104.

2. Nand Lal v. Abdul Aziz, [1916] 43 Cal. 1052.

son whose equitable right was created subsequently; that is, equitable rights or claims rank in the order in which they are created. Thus if A mortgages a property to B, then to C and then to D; C and D will have equitable interest in the property subject to B's rights, and C's interest having been created first in point of time will have priority over D's claim.

This rule, of course, applies only when the equities are equal. So if the moral claims of C and D are not equal the maxim has no application. Thus in the case stated, if C has through fraud, neglect or by any other wrongful act of his led D to suppose that no equitable right was outstanding in his favour, his interest would be postponed and D's claim, though later in point of time, would gain priority.

As between equitable claims, if any dispute as to priority arises, the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other[1]; thus for instance, a prior equitable mortgagee who being entitled to possession of documents of title omits to get them would be postponed to a subsequent equitable morgagee who takes the documents without notice of the prior encumbrance.[2] The leading case of *Rice* v. *Rice*[3] also illustrates this rule. A sold certain leaseholds to M and executed a deed of assignment of his interest and acknowledged in the body of the deed the receipt of the purchase-money, part of which, however, only was paid. The title-deeds were given to M the purchaser, and he, on the succeeding day, handed over the same to J, as a security for a debt due by him to J. It was held that as against J, the vendor A had no lien on the property for the unpaid purchase-money.

The question of priority in case of certain equitable interests depends also on the giving of notice to certain parties. This has been considered in the chapter on Equitable Estates, Interests and Assignments.

1 National Provinces Bank v. Jackson, (1886) 33 Ch. D I, 13.

2 Farrand v. Yorkshire Banking Co., (1888) 40 Ch. D. 182 Ward v. Valletort, etc., Co., (1903) 2 Ch. 654 [prior floating charge postponed].

(5) He who seeks equity must do equity.—The person invoking the assistance of a court of equity must himself act fairly. The court of equity is a court of conscience and therefore sees not merely that the defendant but also the plaintiff acts as a conscientious man would. This maxim is exemplified by a wife's equity to a settlement ; where before the passing of the various Married Women's Property Acts in England a husband claiming his common law right asked for possession of his wife's property, courts of equity always insisted on his making a fair settlement in her favour. Similarly, if an expectant heir or any other person seeks to set aside an unconscionable bargain, the court would relieve him on condition of his repaying the money borrowed with fair interest, i. e., on his discharging his obligation fairly. " I understand," observed *Kay L. J.*, " the rule to be this, that where parties are coming simply for equitable relief the court of equity may say ' we have a discretion whether we will grant or refuse that relief, and therefore, we can grant it upon such terms as we think right to impose because you are asking equity, and therefore we impose certain terms on you. ' " —In an equitable action by a borrower to recover securities mortaged to an unregistered money-lender the mortgagee will not be ordered to give up to the mortgagor the securities, the subject of the mortgage except upon the terms that the mortgagor shall repay the money which had been advanced to him.[1] In Lewis v. Plunckett[2] it is held that a mortgagor in possession of the mortgaged property is entitled to recover the documents of title from a mortgagee whose claim is time barred without repaying the loan. It is because a distinction is drawn between a case in which a transaction is illegal and a case in which it is unenforceable. In the latter case it has been held that the borrower can recover a security without repayment.[3]

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1 Lodge v. National Union Investment Company, (1907) 1 Ch. 300.

2 1937 Ch. 306.

3 Cohen v. Jester & Co. Ltd.. 1938 4 All E. R. 188.

S. 51 of the Transfer of Property Act entitled a transferee of immovable property making improvements on the property believing in good faith that he is absolutely entitled thereto, to compensation; the rightful owner evicting him must do that transferee equity, i. e., give compensation for the improvements.

Under ss 64 and 65 of the Indian Contract Act, the party who has received any benefit under a void or voidable contract is made to restore such benefit or make compensation to the party from whom he has received it. The maxim is illustrated also in ss. 14, 15 and 41 of the Specific Relief Act.

(6) **He who comes to equity must come with clean hands**, i. e., the person seeking relief must not himself be guilty of conduct (with regard to the same transaction) which would disentitle him to the assistance of the court. The conduct complained of must have an immediate and necessary relation to the equity sued for. It must be depravity in a legal as well as in a moral sense and not general depravity.[1] He must be clear of any participation in fraud or similar inequitable conduct, e. g., if a person uses a label which is a deliberate combination of other registered label with a view to represent and sell his wares as the wares of others, he cannot be allowed to take out an injunction restraining some other person from imitating his label.[2] If a minor child, by fraudulently concealing his age, has induced his trustee to commit a breach of trust, he himself cannot claim assistance from the court of equity.[3] This maxim is also applicable in cases of *benami* transactions. Where property has been conveyed *benami* with the object of defeating the claim of the creditors, and the fraudulent purpose has

1 Dering v. Earl of Winchelsea, [1787] 1 Cox Eq. p. 319.

2 Abdul Kadar Allibhoy v. Mahomedally Hyderally. 3 Bom. L. R. 220.

3 Overton v. Banister. 3 Hare, 503.

been carried into effect, the real owner will not be allowed to recover the property.[1]

For further illustration of the above maxim from the statutes, see ss. 22, 25 and 28 of the Specific Relief Act and S. 23, Indian Trusts Act.

(7) Equity looks upon that as done which ought to have been done.—Equity regards a person who has incurred an obligation to do something as having done it; thus if land is contracted to be sold, a court of equity will deem it to have been actually sold, and converted. This maxim applies in cases of conversion. *Equitas factum habet quod fiereoportuit.*[2] The true meaning of this maxim is that equity will treat the subject-matter of a contract as to its consequences and incidents in the same manner as if the act contemplated in the contract of the parties had been completely executed. But equity will not thus act in favour of all persons, e. g., not in favour of volunteers, but only in favour of purchasers for valuable consideration. All agreements are considered as performed which are made for a valuable consideration in favour of persons entitled to insist upon their performance.[3]

S. 53A of the Transfer of Property Act furnishes an illustration of the above maxim and it enacts that where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee, has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract, and has done some act

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1 Goberdhan v. Ritu, 23 Cal. 962; Kalicharan v. Rasiklal, 23 Cal. 962. Guddappa vs. Balaji. I. L. R. 1941 Bom. 575.

2 Fletcher v. Ashburner, 1 W. & T. 327.

3 Foster v. Reeves, (1892) 2 Q. B. 255; Ganesh v.Bapu, 21 Bom.198.

in furtherace of the contract, and the transferee has performed or is willing to perform his part of the contract then notwithstanding the fact that the contract has not been registered or is not in the form required by law the transferor is debarred from questioning the title of the transferee. The want of registration or the fact of the contract not being in the proper form will not assist him since equity, looks upon that as done which ought to have been done. Reference may also be made to s. 27A of the Specific Relief Act.

(8) **Equality is equity**,—This maxim expresses in a general way the object both of law and equity, namely, to effect a distribution of property and losses proportionate to the several claims or to the several liabilities of the persons concerned. For equality, in this connection does not mean literal equality, but proportionate equality. The maxim is also illustrated by the inclination shown by courts to hold a tenancy as a tenancy-in-common rather than a joint tenancy; for in the latter case the whole estate goes to the survivor. This maxim is of constant application to many transactions. e, g., contribution between trustees, co-sureties and marshalling of assets. The maxim is well illustrated in the case of **joint purchasers**; where two or more persons advance purchase-money of an estate in equal or unequal portions, there will be no right by survivorship if one dies, but the survivor will be a trustee for the heirs of the deceased. In the case of a mortgage to A and B jointly equity will look upon each of them as a trustee for the heirs and legal representatives of the co-mortgagee irrespective of the fact of the amount of money advanced by each of them. Equity severs the joint tenancy on the slightest pretext. This maxim is also expressed "*Æqualitas est quasi æquitas,*" i. e,. "Equity delights in equality.[1]"

This maxim may further be illustrated from our statutes. One of a number of joint promisors who has performed

1 Lake v. Gibon, 1 W. & T. 198.

the promise is entitled to compel the other promisors to contribute equally with himself.[1] Co-sureties are liable to contribute equally.[2] Legacies abate rateably.[3] There is contribution also as between co-trustees,[4] S. 73 of the Civil Procedure Code and s. 45 of the Transfer of Property Act also illustrate the application of this maxim.

(9) **Delay defeats equities:**—Or, as it is technically expressed, "*Vigilantibus non dormientibus oequitas subvenit*," i. e., "Equity will not assist those who slumber over their rights." Irrespective of the law of limitation a court of equity will view laches on the part of a person seeking relief with disfavour and may refuse specific performance or injunction. No aid is rendered to stale demands. A person seeking any equitable relief is particularly bound to prosecute his claim with diligence. Everything depends upon the merits of each case. For example, when a person wants a mandatory injunction, his laches will defeat his claim to it.

A court of equity has always refused its aid to stale demands where the party has slept upon his right for a great length of time. Even a comparatively short period of delay not satisfactorily acconnted for tells heavily against the plaintiff in equity in respect of equitable right or for equitable relief. The rule does not, however, apply where the party is disabled from bringing an action by fraud or inevitable reasons.[5]

This maxim will not apply to legal or equitable claims to which the statutes of limitation apply expressly or by analogy. In such cases, delay so far as it is within the statutory period will not defeat a claim.

(10) **Equity imputes an intention to fulfil an obligation.**—Thus if a man *covenants* to buy and settle land and subsequently buys the land but dies without settling

1 S. 43; I. C. Act. 2. S. 146, I. C. Act. 3. 330, I. S. Act.
4. S. 27. I. T. Act.
5. Per Lord Camdon in Smith v. Clay, 3 Bro, C. C, 640, n.

it, a court of equity will presume that the purchase was made with the intention of fulfilling the obligation of settling it. S. 92 of the Indian Trusts Act *gives* effect to this maxim. The equitable doctrines of performance and satisfaction are based upon this maxim.[1]

(11) Equity looks to the intent rather than to the form, i. e., it regards the spirit and not the letter of the law; the actual form of the transaction is not so very material as the actual intention of the parties entering into it. This maxim is illustrated by the doctrine of penalty and forfeitures, and the court of equity relieves against this. This maxim is also useful in determining whether a particular transaction is a sale or mortgage.

If a sum of money specified in the bond be penal, a court of equity refuses to enforce payment thereof in full, even though the parties expressly state in the bond that the specified sum is the amount of the agreed damages for breach of the conditions of the bond.[2]

(12) Equity acts in personam ('*Aequitas agit in personam*").—This maxim is one of procedure rather than of substantive law. It is the widest and most important of all the maxims. In a sense, it comprises the whole of equity. It gives a court jurisdiction in cases relating to lands which are outside its jurisdiction. The importance of the maxim lies in the different modes of enforcement of the decrees of the courts of law and the courts of equity. The court of equity originally did not attempt to enforce its decrees by execution against the defendant's property but it enforced them by process against the defendant's person. Its decrees were orders to him to do or to abstain from doing certain acts. If he did not obey the orders, he was arrested and imprisoned until he obeyed.

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1. Blandy v. Widmore, 2 W. & T. 404.

2. Peachy v. Duke of Somerest, 2 W. & T. 250; see s. 74, Indian Contract Act.

The application of the maxim was brought into action, particularly, in cases where the land in question was outside the jurisdiction of the court. In such cases if the parties were in England, the Chancery Courts had no hesitation in trying these suits provided they were actions suitable for a Court of Conscience, and provided it could efficiently try them and could give an adequate remedy. A court of equity only assumes jurisdiction in relation to land abroad, where as between the litigants or their predecessors some privity or relation is established on the ground of contract, trust or fraud. Thus in cases of trusts, specific performance of contracts, foreclosure or redemption of mortgages or in the case of land obtained by the defendant by fraud, the court may very well assume jurisdiction even though the land in question may be outside the jurisdiction of the court. In such cases, though common law would not allow interference, equity comes in for the sake of justice, for the courts of equity in England are and always have been Courts of Conscience operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilli* within their jurisdiction.[1] Of course, the court cannot in such a case issue execution *in rem* but can do so *in personam* only, i. e., by attaching the person or goods of the judgment-debtor within its jurisdiction till he complies with the judgment. But the court of equity will not interfere when the title to the land is itself in question: that case would be governed by the *lex loci res sitae*, i. e., law of the place where the subject-matter is situated; nor will the jurisdiction of the court to act *in personam* be exercised where the defendant occupies such a position as to be exempt from such jurisdiction, e. g., a foreign Sovereign or Government. It cannot enforce the contracts of a foreign Government even against the property

1. Holkar v. Dadabhai, 14 Bom. 353; Penn v. Baltimore, 1 W. & T. 755.

of such Government in England.[1]

In the leading case of *Penn v. Baltimore*, the plaintiff and defendant being in England, had entered into articles for settling the boundaries of two provinces in America—Pennsylvania and Maryland—and the plaintiff sought specific performance of the articles. The principal objection was that the property was out of the jurisdiction of the court. It was held that the plaintiff was entitled to specific performance of the articles, for the court acts *in personam.*[2]

High Courts in India have all the powers of a court of equity in England of enforcing their decrees *in personam.*[3] In the proviso to s. 16 of the Civil Procedure Code, we have an application of the maxim "Equity acts *in personam.*" Where the suit is to obtain relief respecting or compensation for wrong to immovable property, the Indian courts would assume jurisdiction if the relief sought can be obtained through the personal obedience of the defendant, i. e., if the defendant resides or carries on business within the local limits of the jurisdiction of the court in which the suit is instituted. *In Holkar* v. *Dadabhai*, the Bombay High Court held that the court had jurisdiction to try a suit for specific performance of an agreement made in Bombay, but relating to land situate outside the jurisdiction. On the same principle it has been held by that court that a suit can be entertained in Bombay wherein a mortagee seeks to enforce his mortgage by sale of lands mortgaged which are outside the jursidiction of the court, if the mortgagor resides within its jurisdiction.[4]

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1 White or Tudor's Leading Cases, p. 655. Cf s. 86 Civil Procedure Code.

2 Penn v. Baltimore, [1750] 1 Ves. 444.

3 Holkar v. Dadabhai, 14 Bom. 353.

4 Hatimbhoy v. Framroz Dinshaw, [1927] 29 B. L. R. 498, [F. B.]; India Spinning and Weaving Co., Ltd., v. Climax Industrial Syndicate, [1925] 27 Bom. L. R. 1281, overruled.

CHAPTER IV.

TRUSTS.

"A trust is the binding of the conscience of one to the intention of another." BACON.

Origin of trust.—The origin and history of trust is complicated and difficult to trace. The modern trust traces its origin to the ancient 'use' and it was therefore said to be "the daughter of the use." The several stages through which the trust, as we know it, had to pass may be briefly noted. After the Norman conquest the theory of law was that all land belonged to the Conqueror (William); he divided the land among his followers for military service; at first such a person held the land only during his lifetime but gradually he acquired the right of ownership and alienation. There were a number of disabilities attached, however, to the rights of the holders of the land and a common practice of conveying parcels of land to religious houses grew up. The law looked upon these conveyances with jealous eyes because no military service could be expected from the owners of these houses, and there could be no escheat of the land as in the case of the death of an individual. The **Statute of Mortmain** was passed to put a stop to such direct conveyances to religious houses. To evade the Statute, the clergy resorted to the device of having conveyances made to a third person to the use of or in trust for themselves (the clergy). Other people also began to take advantage of this device and the practice of *conveying land to A to the use of or in trust for B* grew up. Here A was regarded as the lawful owner of the property but the court of equity compelled him to account for the profits to B. Thus the trusts in favour of persons began to be recognized and enforced. This practice of conveying land to a person to the use of another was very much in vogue because it freed the

owner of land from certain burdens attaching to his owner-ship, e. g., wardship, marriage, escheat, etc. He could do it by conveying land to a friend or a party of friends for his own use. The result of such a conveyance would be that he would have the pro its and enjoyment of the land, while the person to whom the land is conveyed would be the legal owner. By virtue of this scheme he could evade—

(1) the feudal burdens of wardship and marriage;

(2) the law of forfeiture for treason;

(3) the Statutes oi Mortmain; and

(4) his creditors.

These malpractices became very prevalent, and to put an end to them the **Statutes of Uses** was enacted whereby in case of a person holding lands to the use of another, he who had the use was deemed in lawful possession of the actual estate. Thus if land was conveyed to A for the use of B, the Statute of Uses did not recognize A's legal ownership, but, on the contrary, declared B to be the legal owner. The object of this Statute was to abolish uses and trusts. But the object was not attained inasmuch as the Statute applied only to *freehold* property which alone was capable of seisin, and did not touch personal property, leaseholds, copyholds, etc. It further applied only to *passive* uses and not where the person to whom land was conveyed to the use of another person had to perform some duty for the benefit of another person.

Further, the object of this Statute was frustrated by the decision in **Tyrrel's case** which marks an epoch in the history of trusts. That case decided that *there could not be a use upon a use*; thus the first use only was executed and if a use was engrafted upon a use, the letter could not be executed; that is, where land is conveyed to A to the use of B, to the use of C, the use in favour of C could not be enforced at common law. The courts of equity, however, intervened and gave effect to the use in favour of C, on the principle

that though B, the owner of the first use, took the legal estate, he held it only for the benefit of C who had the second use. The second use is called a trust. It was in this ingenious way that the Statute of Uses was evaded and effect was given to the second use.

Definition of trust, trustee, beneficiary.–Trust is an obligation annexed to the ownership of property and arising out of confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner. The person in whom the confidence is reposed is a *trustee*; a person who reposes confidence is the creator of the trust or settlor, and the person for whose benefit the confidence is reposed is the beneficiary or the *cestui que trust*. (S. 3, Indian Trusts Act.)

Different definitions of trust are given by English text-book writers, Snell, Story, Smith, Indermaour, Underhill and others. *Story* defines it to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. *Smith* defines it as a duty deemed in equity to rest on the conscience of a legal owner. *Snell* calls it a beneficial interest in or beneficial ownership of real or personal property, unattended by the legal ownership. As now understood a trust is:—

(1) As regards a trustee, a duty arising out of legal ownership or other legal interest for benefit of another, and

(2) As regards the *cestui que trust*, a beneficial interest severed from legal interest, i. e., equitable ownership.

Classification of trusts.—Trusts may be classified as follows: ..

I. (1) Public or charitable.
(2) Private.

II. (1) Express, i. e., one which is clearly and directly created in express words by the settlor.

(2) Implied, indirectly gathered from unexpressed but presumable intention of the settlor.

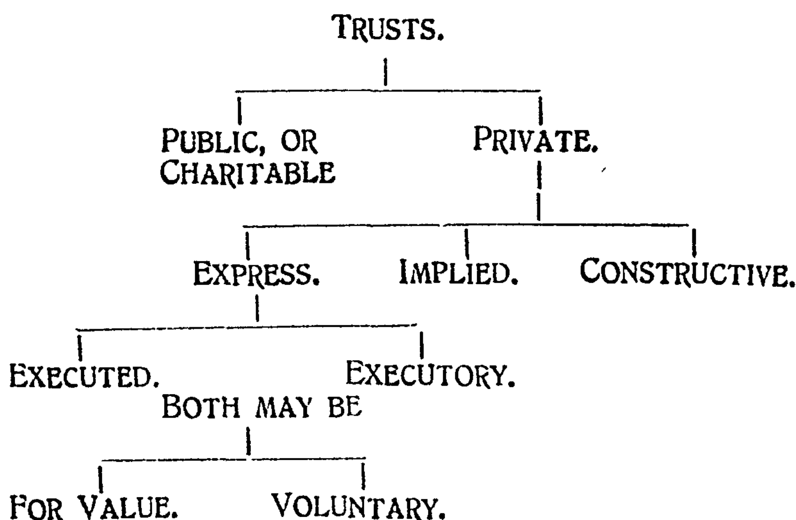
(3) Constructive, arising by operation of equity in favour of another.

III. (1) For value.

(2) Voluntary.

IV. (1) Executed, i. e., when it is fully and finally declared by the instrument creating it.

(2) Executory, when the settlor has given general directions for future conveyance.



Scope of Trusts Act.—The Indian Trusts Act deals with private trusts only: s. 1 exempts public or religious chraitable trusts from the operation of the Act. It also saves from its operation the rules of Mahomedan Law relating to wakf.

Creation of trust.—A trust may be created by a deed *inter vivos* or by will. It may be created by word of mouth or in writing. It is not necessary that the word 'trust' should occur in the writing in order to establish a fiduciary relationship. It is of no consequence that the word is not

used if the sense is clearly there.[1] Any words that show that the donor, at the time he speaks, means to divest himself of all beneficial interest in the property are sufficient for the purpose of creating the trust.[2] When it is created by word of mouth it must, however, be shown that there was either an express declaration as to the trust or that there is evidence of language or expressions used by the owner of the property to indicate with reasonable certainty that a trust was created. If there is no express declaration or if there is no language from which the court can infer that a trust was declared or created, then there must be atleast evidence of acts or conduct to show that the owner of the property intended to constitute himself or another person a trustee of the property for someone else.[3]

The three certainties—To constitute an effective declaration of trust, the language used must make it certain (1) that the settlor intended to constitute a trust binding in law on himself or the person to whom the property was given, (2) that he intended to bind definite property by the trust, and (3) that he intended to benefit a definite person or persons in a definite way.[4] These are technically known as the three certainties essential for creation of every trust.

Certainty of words.—The words must be capable of being construed as imperative and not merely discretionary on the first taker (trustee) of the property. Merely saying "I hope or desire" does not satisfy the requirement of law, and words are not construed as imperative if there are other words to deprive them of that effect, mere use of the word "trust" does not create one if the trust is not intended.[5]

Certainty of Subject-matter.—The subject-matter

1. Merbai v. Perozbai, 5 Bom. 268, 278; Re Fazalbhai Mills Ltd., 38 Bom. L. R. 541.
2. Grant v. Grant, 34 Beav. 623.
3. Madhavprasad v. Mongilal, 30 Bom. L R. 189.
4. 30 Bom. L. R. 189, supra.
5. *Mamori case*, [1902] A. C. 56.

of a trust must be certain. The first taker (trustee) should have no discretionary power to withdraw any part of the subject-matter from the object of the trust;[1] e. g., where there is an absolute gift to one person coupled with a recommendation that the donee shall give to a certain other person what shall be left at his death, the subject is uncertain.[2]

Certainty of object.—The object, i. e., persons intended to have the benefit of the recommendation, should be such as may be ascertained with reasonable certainty. The person must be named or at least the class out of which he is to be selected must be defined,[3]

Effect of absence of certainties.—If the first certainty is absent, i.e., there are no definite imperative words creating à trust. no trust is in fact constituted. The result is that the person to whom possession of the property has been given takes the property for his own benefit. Where the second certainty is absent, a trust is constituted because there was a definite intention to constitute it, but it is void for uncertainty as there is no proper designation of the property to be affected by it. Here, too, the person in possession of the property will take it beneficially, In the case of the absence of the third certainty, a trust is constituted, but it is void for uncertainty, and the beneficial interest will result to the settlor, or if he is dead, to the persons entitled to his property under the law of succession.

Who may create a trust.—Any person capable at law or in equity of alienating to any extent property or an interest in property is to the same extent capable of creating a trust in that property or interest.[4] It may be created by every person competent to contract and with the permission

1. Buggins v. Yate, 9 Mad. 22.

2. Constable v. Bull, 3 Deg. & Sm. 411; Megison v. Moore. 2 Vesp. 633.

3. Sall v. More, I Sim. 534; Re Williams, (1897) 2 Ch. 12.

4. Halsbury's Laws of England, Vol. XIII, p. 9.

of a principal Civil Court of original jurisdiction, by or on behalf of a minor.[1]

There must be nothing to restrict the power of the settlor in this behalf. The question will also depend upon the personal law of the parties. A settlor cannot create a trust of a merely beneficial interest under a subsisting trust.[2] In England a sovereign can create a trust in respect of his private property; so can a married woman; but a corporation cannot; nor can bankrupts, convicts or lunatics.

Purpose of trust.—A trust can be created only for a lawful purpose.

Purpose is lawful unless when :—

(1) it is fraudlent ; or

(2) it is forbidden by law : or

(3) it is such that if permitted, it would defeat the provisions of any law ; or

(4) it involves any injury to the person or property of another ; or

(5) it is regarded by the court as immoral or opposed to public policy.

If the purpose is unlawful the trust is void. A trust in respect of any immovable property situate in a foreign country must also be lawful according to the law of that country.[3]

Who can be a trustee.—[Any person who is capable in law of holding property in his own right may hold the office of trustee in respect of such property.] Thus all persons including married women, corporations, aliens, are capable of being trustees. But where the trust involves the exercise of discretion, it is necessary that he must be a person competent to contract.[4] All persons who are competent to contract are not, however, necessarily fit to be trustees. The following are not proper persons to be appointed trustees ; a person domiciled abroad, an alien enemy, a person having

1. I. T. Act, s. 7.
2 S. 8, I. T. Act.
3 S. 4, I. T. Act.
4 S. 10, I. T. Act.

an interest inconsistent with that of the beneficiary, a person in insolvent circumstances, and a married woman and a minor.[1]

Who may be a beneficiary.—Every person capable of holding property may be a beneficiary. He is not bound to accept the interest under the trust. He may renounce his interest by disclaimer addressed to the trustee or by setting up a claim inconsistent therewith.[2]

Acceptance of office.—Office of a trustee is one of confidence at a person's free will to accept or refuse, and no one is under any legal obligation to accept it. It may be accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance; but acceptance is presumed if the trustee does not disclaim within a reasonable time.[3]

The effect of disclaimer is to prevent the property vesting in that person. If one of two or more trustees disclaims, the property vests in the other trustees; no formalities are required as to acceptance of office; it may be by words or conduct, i. e., by proving the will of the creator of the trust or doing an act referable to the character as trustee, by executing the settlement, or bringing action as to trust property in his name, advertising trust property for sale, etc.

The English law on the subject is the same; no one is bound to accept the office. He can disclaim it, but then he should disclaim by deed and without delay; but if he has once accepted, he cannot renounce except under certain circumstances; acceptance to be implied must be a result of acts done referable to the character as trustee. A trustee cannot accept a part and disclaim the rest.

Requisites of a valid trust.—I. The Indian Trusts Act requires that the author of the trust must indicate with reasonable certainy by words or act :—

1 S. 60, Exp. [1], I. T. Act.
2 S. 9, I. T. Act.
3 S. 10, I. T. Act.

(1) an intention to create it,

(2) the purpose thereof,

(3) the beneficiary,

(4) the trust property.

No technical expressions are needed.[1] It is sufficient if the meaning is clear. The words must show an intention to create a trust with a reasonable certainty; the purpose of the trust, the trust property and the beneficiaries, must be indicated and in such words that the trust could be administered by the Court if occasion arose;[2]. They be may followed by words expressive of confidence or desire ; but then they must be capable of being construed as imperative e. g., "I have no doubt," "I have full confidence," etc., and not merely saying "I hope." See "Precatory trusts" (*infra*).

II. The property must be *transferred* to the trustee unless the trust is declared by a will, or the author of the trust is himself one of the trustees.[3] If the author of the trust is one of the trustees it is enough ; then no transfer is necessary, for the settlor changes the character in which he holds the property.[4] In order that the owner of the property may constitute himself the trustee it is necessary that he must use language to show that there is a clear intention on his part to affect his proprietary rights. A trust cannot be presumed merely because a father or husband, opens an account in the name of his son or wife.

III. If the property is immovable it must be declared by a non-testamentary instrument in *writing* (signed by

1 Cox v. Page, 163.

2 Patel Chhotabhai & Others v. Jnan Chandra Basak. 62 I. A. 146= 37 Bom. L. R. 567.

3 Bai Mahakore v. Bai Mangla, 13 Bom. L. R. 570.

4 Dhondu v. Keshav, 7 Bom. L. R. 179.

5. Ashabhai, 9 Bom. 129 Chanmbers v. Chambers. A. I. R. 1944 P.C.78.

the author of the trust or trustee) and registered; or by will of the author of the trust or trustee.[1]

If it be movable, it should be declared either as in the case of immovable property, or the ownership of the trust property should be transferred to the trustee. No such transfer, however, is possible nor is it necessary, when a person constitutes himself the trustee.[2]

S. 8 of the Indian Trusts Act forbids a trust upon a trust, or a trust of a mere beneficial interest. A Parsi settlor created a trust of his property, giving a life-interest in one-fifth of the estate to each of his five children, and after the death of each of them dividing his or her share among the issue of the child. B, one of the daughters of the settlor, had a daughter G, who died during B's lifetime making a will by which she made a trust of the property which would come to her share on B's death under the trust-deed. The disposal is valid inasmuch as it was a trust of the actual property given by the trust-deed to G receivable by her on the death of her mother B, and it was not a trust of a mere beneficial interest.[3]

Precatory trusts.—The Trusts Act does not require that there should be express words to create a valid trust.

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1. In England before the Statute of Frauds came into operation, trusts of every kind of property could be created by parol and were not required to be in writing By ss. 7 and 8 of the Statute, all express trusts of land are required to be in writing signed by the maker thereof legally entitled to do so S 9 requires grants and assignments to be in writing signed by the party granting or assigning the same S 53 of the Law of Property Act, 1925, now requires a trust to be evidenced by writing. The section does not touch the creation of implied or constructive trusts. A trust of pure personalty does not require to be in writing.

In India, s. 5 lays down rules as to when writing is required to create a trust. It is only a trust of immovable property that must be in writing and registered. While a trust of movable property can be created by parol.

2. Ss 5 and 6, I. T. Act, (1911) 13 Bom L. R. 69.

3. Pestonji Jalbhoy Chichgar v. Jalbhoy Jehangir Chichgar, 36 Bom. L. R. 42.

It is not necessary that any technical words or formal expressions should be used. Settlors often use the words "hope," "wish," "fully confident," "heartily beseech." when they give the property absolutely to a person; in such cases recommendation or the words of entreaty were held by the court of equity to amount to what is technically known as "precatory trust" and the trust was given effect to. The doctrine of precatory trusts applied to settlements *inter vivos* as well as to wills.

The court will not allow a precatory trust to be raised unless on a consideration of all the words employed it comes to the conclusion that it was the intention of the settlor to create a trust; and the modern tendency is against the establishment of such trusts. In *Mussoorie Bank v. Raynor*[1] the words used in the will of R were. "I give to my wife Mary Anne Raynor, the whole of my property, both real and personal, feeling confident that she will act justly to our children in dividing the same when no longer required by her"; it was held that the widow took an absolute interest and the doctrine of precatory trusts did not apply. The court, in construing such an instrument, will gather the intention of the testator as to the creation of the trust from the whole instrument. Where a gift is on the face of it absolute, the mere expression by the donor of his hope, confidence or desire that the donee shall use the thing given for a certain purpose, will not make the donee a trustee of it for those purposes, unless it clearly appears from the context and circumstances that the donor intended his hope, confidenee or desire to be binding in law upon the donee.[2] In *Gregory v. Edmundson*[3] there was a gift of stock to a person, the testator adding parenthetically "to enable him to assist such children of my deceased brother as he may find deserving of encouragement," and it was held that no trust was created for the brother's children. The decision in *In re Adams and the Kensington Vestry*[4] marked the final repudiation of the old rule as to pre-

1. (1882) 7 A. C. 331.
2 Strahan's Leading Cases in Equity, p. 64.
3. 39 Ch. D. 253. 4. (1884) 27 Ch. D. 394.

catory trusts. The old rule was that where a gift, however absolute in terms, was accompanied by a request or wish on the part of the donor that the donee should use the property given for a certain object, that *prima facie* bound the donee in law so to use it.

Prob.—(*a*) A devised and bequeathed real and personal property to his wife B for her life with power to dispose of all of it as she might judge best, he relying on her discretion and that she would dispose of it in accordance with his wishes with which she was perfectly acquainted. There was some evidence of the testator having communicated some wishes to his wife but none as to what they were.

(*b*) A devised and bequeathed property to his wife B under the firm conviction that she would dispose of and manage the same for the benefit of their children.

What interest does B take in these cases ?

A.—(*a*) B takes the property for her life ; she is a trustee for objects unascertainable and there will be a resulting trust for heir at law or next of kin according as the property be real or personal ; the objection of uncertainty will not apply.

(*b*) The words "firm conviction" creat precatory trust and B is to hold as a trustee for the children and not for herself absolutety.[1]

Power in the nature of trust ; power and trust distinguished.—Where a person is invested with power to determine the disposition of property of which he is not the owner, he is said to have power of appointment over such property.[2] Powers are of two kinds, (1) general and (2) special. In the case of a general power of appointment, the donee of the power can appoint the property to any person or persons, and in such proportion as he thinks fit. While in the case of a special power of appointment, the donee has to exercise the power of appointment in favour of a particular

1 Lidard, 28 Beav. 266

2. S. 69. I. S. Ac, 1925.

person or persons named by the donor of the power. These special or limited powers are often in the nature of trusts. Where a person in terms which import a duty to exercise the power is empowered to apply property for the benefit of such members of a specified class of beneficiaries as he in his discretion thinks fit, and there is no gift over in the event of his not exercising the power, a trust is created in favour of that class and the whole class, if and so far as the trustee does not exercise his discretion, takes the property in equal shares. The power does not assume the nature of a trust if there is a gift over in the event of its being not exercised or if the language does not intimate an intention to make the exercise of the power a duty or to benefit the class otherwise than by the exercise of the power.[1] This power, though apparently imperative, is not imperative but is merely optional ; at differs from a trust in this, that while in a trust the power of imperative, here it is optional. The legal consequences of these are that the court will never execute (enforce) a mere power but it will always execute a trust ; and a power in the nature of trusts is midway between these. A court of equity will execute it so far as it can, to give effect to the intentions of the settlor in case where such a power is not discharged by the person.[2]

Trust distinguished from bailment.—The true nature of distinction between a trust and a bailment will be apparent from the following illustrtion:–

A deposits with or lends a quantity of books to B. Here, A is the bailor and B is the bailee of books. B sells the books to C, the sale being unauthorised by the terms of bailment. C, though he purchases in gooh faith and without notice of A's rights, does not get a good title to the books. A can sue C for recovery of the books and will succeed in recovering them because C bought them from B who was

1 Halsbury's Laws of England Vol. XIII, p. 17.

2 Burroughs v. Philcox, 5 My. 72 ; Brown v. Higgs, 8 Ves. 561.

not the owner of them. Now take the case of a trust. X holds books as trustee for Y. In breach of trust, X sells them to S who buys in good faith and without notice of the trust. Here S is the owner of the books and Y has no rights against S who is a *bona fide* purchaser for value without notice. Thus the difference between a trust and a bailment is that whereas the bailee has only a special ownership in the in the goods bailed, the trustee has the full ownership of the goods he holds subject, of course, to the trust.

CHAPTER V.

The distinction between trusts executed and executory—Rule in Shelley's case.—Voluntary trusts.—Trusts in fraud of and for benefit of creditors.—Secret trusts.—Liability to see to application of purchase-money by trustee.

Executed and executory trusts.—This is one of the modes in which trusts (express) are classified. As held in *Egerton Brownlaw*,[1] a trust is "executed" when it is fully and finally declared by the instrument creating it, i. e, where the limitations are complete and final and nothing is left to be done, but merely to take the limitations and convert them into legal estate; in such cases it is technically said that "the settlor is his own conveyancer." As opposed to this is a case where the express trust, though expressly intended, is not expressly stated; where the settlor instead of putting into words the precise nature of the limitation, leaves them for the trustees to execute, saying they were his intentions, the trust is "executory." The difference in short comes to this—in trusts "executed" nothing whatever is left to be done to *constitute* it, the trust being finally declared by the instrument which evidences it; in trusts "executory" something is left to be done.[2] There is a mere

1 4 H. L. C. 210.

2 Miles v. Herford, 12 Ch. D. 691.

direction to convey upon certain trusts, the instrument which contains the direction not by its own force constituting the trust or effecting the conveyance which it directs.

Agnew defines an executed trust as being one that is complete in itself, the author having finally declared what interest the beneficiary is to take and having left no discretion to the trustees. An executory trust on the other hand is one in the declaration of which the settlor has indicated the objects only in outline, leaving the details to be filled in by another and more formal instrument.[1] If a settlor says, "I convey my estate to B in trust for C," it is an executed trust; if he says, "I by my will give my property to trustee, B and C on trust to cause it to be settled on my daughter," it is executory. In one case the first conveyance itself conveys the estate, and in the other another conveyance is necessary.

No doubt in a sense all trusts may be said to be executory, but a court of equity distinguishes an executory from an executed trust in the manner stated above—the test applied being, whether the settlor has been his own conveyancer. The effect of this distinction may be gathered from the *different ways in which these trusts are construed by courts of equity*. In the case of executed trusts, the same construction is put on technical terms as is put by law courts on limitations of legal estate. Thus the rule in *Shelley's* case,[2] which is merely a rule of law, would apply if an estate is given in trust for a person for life with remainder in trust for the heirs of the body of that person; and such a disposition would give that person estate tail. In executory trusts the court will endeavour to gather the intention of the settlor from the whole instrument and to follow that regardless of all technical rules such as the rule in *Shelley's* case. In case of such a trust it is discretionary to put any construction consistently with the intention of the parties; in fact the language is

1 Strahan's Leading Cases, p. 82.

2 See p. 56, infra.

subordinated to the intent, the main thing being the intention of the settlor.

Where executory trusts are found.—Executory trusts are generally to be found in marriage articles aud wills; in each of these there is a distinction observed in determining the necessary intention. In *marriage articles* the very nature of the instrument gives a clue to the intention, which is none but making provision for children of the marriage; the parents get a life estate and not estate tail so as to bar children. In *wills*, on the other hand, it is the contrary; the court knows nothing of the real object and hence the language used can alone lead to the inference as to the intention; thus the words in a will "to the husband and heirs of his body" will be construed to give an estate tail, unless contrary intention appears, and not merely life estate as in the case of marriage settlement.[1]

Prob.—By his will a testator devised certain lands to trustees in trust to convey them to A for life and after his death to the heirs of his body. Would it make any difference if similar words were used in marriage articles? How would you construe these?

A—This is a case of a trust executory, and it is in a will; the court will look to the intent as evidenced by the strict import of terms in the absence of anything to indicate the contrary; of course, in case of marrige articles, its nature itself indicates the intention, i. e., that it is for the benefit of the issue of the marriage and so the husband (A) has only a life estate; whereas the same words used in the will would give A an estate tail.

The rule in "Shelley's case."—It is a rule of interpretation affecting the disposition or devolution of freehold lands when given to a person and his heirs or the heirs of his body. Thus, for instance, if A by any gift or conveyance (by deed or will) takes an estate of freehold, and in the

1 Sweetapple v. Bindon, 2 Vern. 536; Papillon v. Voice, P. W. 571; Trevor v. Trevor, P. W. 622.

same gift or conveyance an estate is limited, either mediately or immediately, to his heirs or the heirs of his body, the words 'the heirs' are words of limitation of the estate of A and not words of gift to the heirs. The heirs, if they should take any interest, must take as heirs by descent from A, for they are not constituted by the words of the gift or conveyance purchasers of any separate and independent estate for themselves. The grant is construed as simply showing or marking out the estate that A is to take and not as conferring any estate on the heirs.

The effect of the rule was that if there was a gift of land to A for life with remainder to his heirs, A took the land in fee simple and got the right to deal with the whole fee simple; since it was in the same conveyance that an estate was given to A as well as to his heirs. And the same was the effect when some other estate was put between A's life estate and the gift to his heirs. Thus if there was a gift of land to A for life, ramainder to B for life and the remainder to heirs of A, this also would be the case of same conveyance giving an estate to A and his heirs with the result that after B's life estate the property must devolve as property of A in fee simple; the heirs of A would not by virtue merely of the conveyance get any interest directly; so that if A were by his will to leave the fee simple to his second son the eldest son would not be able to claim the property.

This rule has been applied in the case of express private trusts which are already executed, but not so invariably in case of executory trusts, in which case its applicability depends upon whether a contrary intention is or is not expressed or implied by the author or the trust. Thus where the intention is apparent, as in the case of marriage articles, the rule has never been applied. The rule, however, will apply to an executory trust arising out of a will where the court cannot ascertain the intention of the testator. The rule is abolished by s. 131, Law of Property Act, 1925.

Indian Law.—The rule in *Shelly's* case has been held not applicable in India.[1] It is based on feudal considerations and is so special in its nature and origin as to be inapplicable to the different circumstances of this country. It has not been adopted in framing sections 93, 94, 96 and 97 of the Indian Succession Act. The distinction between a case governed by the rule in *Shelley's* case and one to which the Indian Succassion Act applies may be gathered from the following illustration. *Land is given to A for life with remainder to the heirs of A.* The effect of the rule in *Shellly's* case would, as already pointeed out above, be that A would get a fee simple which he can deal with as he likes. This would not be the result under sections 93 and 97 of the Succession Act[2] for A would merely take a limited estate and the heirs of A would be regarded as the direct and independent objects of the gift; there would be a distinct and independent gift in their favour. It is in such cases that it has been held in India that the rule in *Shelley's* case does not apply. In India the question whether the wosds "heirs" or "relations" or "next of kin" or "heirs of the body" are words of purchase or of limitation depends not so much on an absolute hard and fast rule, as on the intention of the parties and the construction of instruments in which they occur.[3] In an agreament between the male and female heirs of a deceased Parsi one of the clauses was that the income of the estate of the deceased was to be taken in certain shares by them and that after their death their shares were to be enjoyed by their heirs and children. It was contended that the rule in *Shelley's* case was applicable to the construction of this clause so that the heirs who were parties to the agreement could take their shares absolutely by barring the entail. It was held, disallowing the contention that the parties to the agreement had expressed their

1. For history and application of the rule in Shelley's case see Lord Macnaghten's celebrated judgment in Van Gruthen v. Foxwell, [1897] A. C. 658, 667—677.

2. Act 39 of 1925.

3. Antao v. Ardeshir, 1 Bom. L. R. 303; Ramkrisharao v. Nanarao, 5 Bom. L. R. 983, 986, 987; Chunilal v. Fulchand, 18 Bom. 160, 171.

intention, that enjoyment of their respective shares should be confined to a life-interest, which was all they took, and that the rule in *Shelley's* case was not applicable.[1]

Incomplete trusts : Voluntary trusts.—Where a trust is completely constituted and is not otherwise unlawful it is always given effect to and no question of consideration for the same arises. But where this is not so and something remains to be done to perfect the trust, question of cosideration for the same becomes important and requires to be noted. A trust for valuable consideration is always binding whether perfected or not ; question, however, arises in case of what are called purely voluntary trusts without consideration. Equity will enforce a voluntary trust only when (1) the subject matter has been actually transferred to the trustee or (2) the settlor has, by the declaration of trust, constituted himself the trustee. *Test* is, " Has the relation of *cestui que trust* been constituted ; if so, it is binding ; if not, it is no good even as a ground of action for constituting it." "*Ellison* v. *Ellison*" is the leading case on the question of settlements in favour of volunteers. It laid down the rule that a purely voluntary trust will be executed only if it is perfectly created.

The maxim underlying this is that ; "There no equity to perfect an imperfect gift." The transfer or declaration must, as observed by *Turner, L, J.*[2] be complete and unmistakable. It is sufficient if the settlor has done all he could to transfer the same by an appropriate conveyance, having regard to the nature of the property comprised in the settlement.

These voluntary trusts, if comprising land, could formerly be avoided and set aside by subsequent purchasers for value under **27 Eliz c. 4** : but now it is not so, provided it be *bona fide* and without a fraudulent intention ; creditors

1 Mithabhai v. Limji, 6 Bom. 151.

2 Milroy v. Lord, 4 Deg. & J. 264. See also Re: Kay's Settlement 1939 Ch. 329.

could also do so under **13 Eliz. c. 5** if they could prove the settlor's intention to defeat them. These voluntary trusts, it should be noted, are valid though executory if they are arising under wills or are in favour of charities.

Note:-Consideration for a trust can be:—

(*i*) Meritorious or good—outcome of relationship by blood or natural affection, (*ii*) valuable, e. g., money marriage, or the like.

(*ii*) Voluntary trusts involve questions chiefly connected with the following—(*a*) Post-nuptial settlement, (*b*) ante-nuptial as regards collaterals, (*c*) creditors' deeds.[1]

Prob.—A, a testator, by his will gave all his property to his solicitor B and made an oral agreement with B that he should hold the property on trust to be declared subsequently and to be contained on a separate piece of paper; the same was written on a paper but its contents were not imparted to B nor was it delivered over to him; on A's death C (who would have inherited the property as next of kin of A but for the alleged trust) claims A's property on the ground that no valid trust has been created.

A.—Both the English law and the Indian Trusts Act require a perfect declaration of a trust; the piece of paper on which the bequest was contained does not seem to have been executed as a will; it is voluntary; and on the principle of *Ellison* v. *Ellison*, the court will not render assistance to B. If it were contained in a will, i. e., if the paper were executed as a will, the executory trust would have been enforced though in favour of B, the volunteer. Then again, there is no actual conveyance to the donee B; further, the donor having made no express declaration of trust for B the donee, C the next of kin will be held entitled to the property.[2]

Avoidance of trusts.—A settlor cannot avoid a com-

1 Ashabai v. Haji Tayeb. 9 Bom. 115; Sir Jamsetji v. Sonabai, 2 Bom, H. C 233.

2 Boyes v. Carrett; 26 Ch. D. 531.

pletely constituted trust unless there is an express power of revocation in the trust—deed. He can set aside the trust on the ground of coercion, fraud, undue influence or mistake. In India a trust created by will may be revoked at the pleasure of the testator. A trust otherwise created can be revoked only (1) by the consent of all the beneficiaries who are *sui juris*, or (2) in exercise of a power of revocation expressly reserved to the author of trust, or (3) when it is made in favour of creditors and not communicated to them at the pleasure of the author of the trust.[1]

Right of subsequent creditors and purchasers to impeach trusts on ground of fraud.—*In England*—Under 27 Elliz., c. 4 any voluntary conveyance of land made with intent to deceive or defraud was void as against subsequent purchasers for valuable consideration. The mere fact of conveying land comprised in the settlement to a subsequent purchaser for value raised the presumption that such conveyance was in fraud of the subsequent purchasers. This was modified by the Voluntary conveyances Act, 1893; s. 2 of that Act provided that no voluntary conveyance of land, made before or after the passing of the Act, if in fact made *bona fide* and without any fraudulent intent, shall be deemed fraudulent by reason of any subsequent purchase for value. Both 27 Eliz., c. 4 and the, Voluntary Conveyances Act, 1893, are now repealed by the Law of Property Act, 1925, and the law on the subject is contained in s. 173 which enacts that every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser. It merely re-states the pre-existing law, i.e., actual fraud must be proved in order to enable a purchaser to impeach a prior voluntary disposition and the onus will be on such purchaser,

And under 13 Eliz., c. 5 all settlements made with an intention to delay, hinder or defraud creditors were *ipso facto* void. That statute applied to all kinds of property, freehold,

1 S. 78. I. T. Act.

leasehold, copyhold, personal, money, etc., and affected settlements for value as well as voluntary transactions. This was with a view to protect creditors against all transfers made to defraud them. All voluntary trusts did not become void; only those that tended to delay or defeat creditors were to be deemed fraudulent. The mere fact that the settlor had at the time of creating the trust debts due to others was not sufficient to make the settlement fraudulent. The court had to be satisfied that the settlor had then no other property to pay his debts; if he had not, *mala fide* intention was presumed. It was not only those that were creditors at the time of the settlement that could impeach the trust: even subsequent creditors could do so if it could be made out that the settlor contemplated a fraud upon them. The rights of voluntary creditors and those for value were the same in this behalf. Creditors could avoid even though they had not obtained decrees in respect of their claims. The test applied was whether there was an intention to defeat or delay the creditors.

13 Eliz, c. 5 is now repealed by s. 172 of the Law of Property Act, 1925. The new Act makes such conveyances voidable and not void as under the old law; further, it protects *bona fide* transferee for valuable consideration as well as for good consideration without notice of fraud.

These matters also came under the Bankruptcy Act of 1883, s. 42 whereby all settlements except (1) ante-nuptial settlements, (2) settlements in favour of *bona fide* encumbrancers or purchasers for value, or (3) post-nuptial settlements of property (acquired in right of the wife after marriage) are void if the settlor were to be a bankrupt within two years from the date of the settlement. That Act also holds settlements void if the settlor becomes bankrupt within 10 years, unless the parties claiming under the settlement can prove (1) that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property settled, (2) that his interest in the property settled had passed to the trustee of the settlement on its execution, It

may be noted that the settlement is not void *ab initio*, but only from the act of bankruptcy; *bona fide* purchasers before that date get a good title.

In India, the same principles have been embodied in s. 53 of the Transfer of Property Act which lays down that every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.[1] The rule cannot, of course, affect the rights of a transferee in good faith and for consideration. The section further lays down that every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. But a transfer made without consideration is not to be deemed to have been made with intent to defraud from the mere fact that a subsequent transfer for consideration has been made. A fraudulent transfer can be impeached even by a subsequent creditor. But when there was no indebtedness at the time of the settlement no *mala fides* can be presumed merely from the possibility that it might prejudice the claim of subsequent creditors.[2] The court must decide in each case whether on all the circumstances, it can come to the conclusion that the intention of the settlor in making the settlement was to defeat or delay his creditors. In fact good faith is more essential than consideration. If the element of good faith is absent, the transaction will be avoided even when there is some consideration. Mere preference of one creditor to another does not render the transaction voidable if the debtor does not retain a benfit for himself. A debtor may pay debts in any order he pleases and may pay any creditor he chooses ; he may pay one creditor and leave another unpaid but he must not retain a beneft for himself.[3] If a transaction is in good

1. It is not necessary that a creditor who sues to have a fraudulent transfer set aside, must have got a decree in respect of his debt, Natha v. Magan, 27 Bom. 146

2. Sadasshiv. v. Trimbak, 23 Bom. 156, 157.

3 Musahar v. Hakim Lal (1916) 43 Cal. 525 (p. c.)

faith, the fact that it is a sale of the whole of the property to one creditor is immaterial.[1]

The Indan Insolvency Acts lay down certain rules relating to voluntary transfers. S. 53 of the Provincial Insolvency Act lays down that any transfer of property not being a tranfer made for and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years of the date of the transfer, be voidable against the receiver and may be annulled by the court. A similar rule is stated in s. 55 of the Prsidency Towns Insolvency Act.

Prob.—X intending to defraud his creditors sells by a registered deed immovable property to Y who knows that an execution is pending against X but not of X's intention to defraud. The creditors of X attached the property. Y sues for a declaration of his title and confirmation of possession. What will be the result ?

A.—S. 53 of the T. P. Act protects Y who is a *bona fide* purchaser for value without notice of an intention to defraud. It has been ruled by the Calcutta High Court that the purchaser's knowledge of an impending execution is not inconsistent with good faith on his part. Again, it is not definite against what property execution was to be had. X had before the attachment full rights to alienate the property to anybody so long as the property alienated was not the subject matter of the suit in execution of which it has afterwards been attached. As a rule of law, a creditor who has no charge on a specific property of the debtor cannot debar the latter from alienating his property to any one till it is attached. Y will succeed.[2]

The only question to be decided from the evidence in such cases is " whether the debtor and the purchaser have contrived the transfer as a cloak to protect the property

1 Ishwar v. Devar, 27, Bõm 146.
2 Ishan Chandra v. Bishu, 24 Cal. 825.

for the benefit of the debtor, because it is not likely that any person would without such an object transfer his property for a grossly inadequate consideratton."[1] It must be clearly proved before the rights of a purchaser for value can be affecled that he has been a party to the fraudulent intent of the transferor.[2]

Prob.—A in consideration of annuities for his life, distributed his property among his children, at their instance without regard to the claims of his creditors B, C and D. The latter on coming to know of the same bring a suit against the donees for their claims.

A.—In this case the alienation is voluntary and without consideration ; there is apparently no express fraudulent intention of A ; under such circumstances it is only the amount of A's indebtedness that can afford a clue to his intention. In such cases the mere fact that the debtor owed debts to others does not make the gift voidable ; however, if the gift is such that the effect of it is not merely naturally but necessarily to defeat the creditors, it would be void able, and the creditors would succeed[3] , if as in this case the donor has after the gift nothing from which he can pay his creditors the fraudulent intention will be presumed in law. If such an intent can be inferred it is not necessary to make out affirmatively the fact of the existence of such an intention in the mind of the donor at the date of the execution thereof. Had A reserved to himself some property how, ever little, from which he could hope to pay his creditors to some extent, the result would not be the same. On the facts as they stand in the case, the creditors B, C and D will succeed in getting the gift set aside and the donees will be compelled to pay the debt rateably.[4]

Trusts in favour of creditors.—The general rule

1 Burjorji v. Dhunbai, 16 Bom. 14.
2 Cornish v. Clark, L. R. 14 Eq. 184.
3 In re Johnson, 20 Ch. D. 389.
4 Gnanbai v. Shrinivas, 4 M. H. C. R. 84.

of English law is that where the creditors are not in any way privy to the trust made by the debtor in their favour, the deed merely operates as a power to the trustees and is revocable by the debtor ; but it cannot be revoked by the beneficiary after the settlor's death for the right is strictly personal to the settlor, it being an arrangement for his own convenience. This rule as laid down in a very early case[1] and since followed,[2] admits of exceptions; thus such a deed is not revocable (1) if it creates the relation of trustee and *cestui que trust*, or (2) if the creditors have been thereby induced to a forbearance of their claims, or (3) if they have assented to or complied with the terms thereof. Thus where a trust in favour of creditors has been communicated to the creditors it can no longer be revoked by the settlor because they might have been induced to a forbearance in respect of their claims.[2a] In England these trusts must be registered within seven days. A creditor will be deprived of the benefit of the deed if he delays or refuses to execute the deed or sets up an adverse title.

S. 78. cl. (*c*) of the Trusts Act allows revocation of a trust created otherwise than by will, if it is for the payment of debts of the settlor—provided it is not communicated to the creditors—at the pleasure of the author or the trust.

Prob.—X was in embarrassed circumstances and conveyed property to Y in trust for the benefit of creditors to whom the conveyance is not communicated, nor are they in any way privy to the conveyance. What are the rights of the creditors in respect of the property so conveyed ?

A.—On the principle of the English case of *Acton v. Woodgate*,[3] since the creditors were not privy to it nor was it communicated to them, the conveyance would operate merely as a power to the trustee but revocable by the debtor himself. He can do it himself only since it is a personal right.

1 Acton v. Woodgate; 2 My. & K. 495.

2. Fitzgerald v. White 37 Ch. D. 18,

2a. White and Tudor's leading cases P. 826; A. I. R. 1939 Mad. 32.

3. 2 My. and K. 495.

Secret trusts.—The term "secret trust" does not necessarily mean a trust of a clandestine nature or one suppressed from the world; it merely imports a trust not disclosed on the face of the will. When property is vested in a person for purposes not declared by the instrument devising or granting it and it appears that but for the testator's or grantor's confidence that the purposes would be fulfilled, the devise or grant would not have been made, a secret trust is created, and on the ground that fraud would be committed by the devisee or grantee if he did not fulfil those purposes, that trust may in equity be enforced against him. Sometimes where there is a gift to a person beneficially on the face of the will, there is a secret understanding that he shall hold the property on certain trusts: and where this is so and the trust is lawful, the trust will be enforced; but if he was not meant to be a trustee but to have a mere discretion, that is not to be converted into a trust. Where a will makes no disposition of the beneficial interest in property which is thereby given to a trustee or is vested in the executor, and nothing appears on the face of the will suggesting the inference that the trustee is to take beneficially, no secret trust will be enforced and the trustee will hold the property for the benefit of the heir-at-law or next of kin. It is invariably necessary for the validity of these trusts, that they should have been communicated to the secret devisee or legatee in the testator's lifetime either previously or contemporaniously with the making of the trust and that he should accept the particular trust. A subsequent communication is of no avail.[1] It must also be definite and not illegal.

A person setting up a secret trust must adduce evidence to show that it was communicated by the testator to the universal legatee and that he agreed to accept the property bequeathed in terms of the trust.

Illusory trust.—It is where by the form of an instru-

1. Blackwell vs. Blackwell 1929 A. C. 318; Re: Keen 1937 Ch. 236.
2. Jones v. Bordley, L. R. 3 Ch. A. C. 362.

ment some persons are apparently beneficiaries but the object of settlor, as gathered from the whole settlement, does not appear to have been to create a trust for their benefit; the beneficiaries cannot in such a case call upon the trustees to carry out the settlement in their favour.[1]

Purchaser not bound to see to application of money.—Formerly in England a purchaser from a trustee was bound to see that his purchase-money was applied in fulfilment of the trust, unless expressly exonerated by the author thereof. It was held that the purchaser was exonerated in all cases of personalty and realty except in case of a trust or charge for payment of specified debts, legatees or annuities generally. But the rigour of this rule was reduced by Lord St. Leonard's Act, Lord Cranworth's Act and the Trustee Act of 1893. So now a purchaser is almost exonerated in every case and the written receipt from a trustee is a sufficient discharge, i. e., he has now to see to the proper application only where lands are devised subject to a specified charge; he has to be satisfied as to the identity of the person and the alleged power. According to sec. 42 of the Indians Trusts Act, receipt from a trustee is sufficient except in case of fraud.

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1. Withamy v. Andrew, [1900] 1 Ch. 237; Kalicharan, 30 Cal. 783.

CHAPTER VI.

CHARITABLE TRUSTS.

Public or charitable trusts.—What is meant by a charitable purpose.—In what respects are charities particularly favoured or disfavoured by the law.—The doctrine of "Cy-pres."

What is a charitable purpose.—"Charitable uses or purposes" are not defined in any statute in India, but they have acquired almost a technical meaning[1] and they include the objects specified in 43 Eliz., c. 4. Lord *Macnaghten* has classifid trusts for charitable purposes as under—

(1) Trusts for the relief of property.
(2) Trusts for the advancement of education.
(3) Trusts for the advancement of religion.
(4) Trusts for other purposes beneficial to the community, not falling under any of the preceding heads,[2] and not being for the purposes merely of sport or hospitality.[3]

In the absence of any definition of charity, the courts in England have been guided by the list of charitable objects which are enumerated in the preamble of 43 Eliz., c. 4, and repeated in the Mortmain and Charitable Uses Act, 1888, s. 13. They are as follows:—The relief of aged, impotent and poor people ; the maintenance of sick and maimed soldiers and mariners , the maintenance of schools of learning, free schools and scholars in universities : the repair of bridges, ports, havens, causeways, churches, seabanks and highways; the education and preferment of orphans ; the relief or maintenance of houses of correction ; the marriages of poor maids; the relief or redemption of prisoners or captives and aid or

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1 The University of Bombay v. The Municipal Commissioner for the City of Bombay, 16 Bom. 226.

2 Commissioners of Income Tax v. Pemsel, (1891) A. C. P. 583; Strahan's Digest of Equity, p. 201.

3 In re Nottage, (1895) 21 Ch. 649.

ease of poor inhabitants in payment of certain taxes. This list has, however, never been held to be exhaustive.

The object which is charitale in a popular sense but which is merely for the benefit of individuals is not necessarily charitable in the legal sense, e. g., bequest to a particular mentioned poor clergy.

In India, under s. 18 of the Transfer of Property Act, charity has been classified under four principles divisions:—(1) Advancement of religion, (2) advancement of knowlegde, (3) advancement of commerce, health and safety of the public, (4) advancement of any other object beneficial to mankind. The illustrations to s. 118 of the Indian Succession Act also clearly indicate the nature of charitable objects and purposes.

The following, among others, have been held to be charitable or religious purposes by courts in India:—Gift of property to temple or idol or for maintenance of priests.[1] *wakfs* or endowments to charitable and religious uses by Mahomedans[2]; gifts for building wells and *hawadas*[3] (troughs) ; gifts for hospitals[4] ; gifts for maintaining schools or universities[5] ; gift for a *dharmashala*[6]; gift for *sadavrat*[7] or for giving feasts to Brahmins[8]; gift for keeping a choultry in repair[9] ; gift to erect "matam" for feeding the poor, and to supply buttermilk to poor persons.[9a]

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1 Thakersey Dewraj v. Hurbhum Nursey, 8 Bom. 432 ; Bhuggobutty Prusonno Sen v. Govru Prusonno Sen, 25 Cal. 112.

2 Mazhar Husain Khan v. Abdual Hadi Khan, 33 All. 400; Biba Jan v. Kalb Husoin, 31 All. 136.

3 Jamnabai v. Khimji, 14 Bom. 1.

4 Fanindra Kumar Mithu v. The Administrator-General of Bengal, 6 Cal. W. N. 321. A gift for founding a private museum would not be a charitable purpose, Fowler v. Fowler, 33 Beav. 616.

5 Manorama Dassi v. Kali Charan, 31 Cal. 166.

6 Jugalkishore v. Lakshmandas, 23 Bom. 659.

7 Jamnabai v. Khimji, supra ; Jugalkishore v. Lakshmandas, supra.

8 Lakshmishankar v. Vaijnath, 6 Bom. 24.

9 Gulam v. Ajiajaim, 4 Mad. H. C. 41.

9a Draivia Sundaram vs. Subramania I. L. R. Mad. 1945 P. 854.

But a gift for *dharma* would be a too vague and indefinite purpose for the court to enforce[1]; as also a gift for the political uplift of India,[2] a gift for the performance of ceremonies for the spiritual benefit of the donor and his family is not for a purpose beneficial to the public.[3]

A gift for the saying of masses is charitable as being for the advancement of religion (1) because it enables a ritual act to be performed which is the central act of the religion of a large proportion of Christian people, and (2) because it assists in the endowment of priests whose duty it is to perform the act.[4]

It has already been observed that a trust in order to be valid must fulfil the three conditions known as the three certainties. This is, strictly speaking, not true of public charitable trusts. The certainty as to the intention to declare a binding trust and the certainty as to the property to be bound by the trust are as strictly insisted upon in charitable trusts as in private trusts. A private trust would fail for uncertainty if the objects to be benefited are not clearly specified ; but a public charitable trust would be sustained, even though the object is not specified, provided there is a general intention of charity.

Charities how far favoured.—They are favoured more than private individuals in the following respects:—

(1) If there is an **absolute intention** to give to charitable purposes only, the trust will be enforced in equity though the object or persons be uncertain—which in case of a private individual would have failed for want of certainty. General intention to give a bequest to charity is effectuated ; bequest is held valid though the settlor has left uncertain the

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1 Ranchordas v. Parvati, 23 Bom. 725 P. C.

2 Subhaschandra vs. Gordnandas I. L. R, [1940] Bom. 254.

3 Limji v Bapuji, 11 Bom. 441.

4 Lindeboom v. Carnille, (1934) I Ch. 162; West v. Shuttleworth, (1835) 2 Myl. & K. 684, and Heath v. Chapman, [1854] 2 Drew 417, dissented from—wherein the gifts for the saying of massess were held as void as constituting superstitious uses.

particular mode in which his intention is to be carried into effect, e. g., where he leaves to the discretion of the trustees the choice of the charitable object.

The object, however, must be distinctly and exclusively charitable.[1] If the property is directed to be applied to charitable or benevolent or charitable or philanthropic objects, the trust would fail because the benevolent and philanthropic objects may not be charitable and the trustee may apply the whole property to a non-charitable object without committing a breach of the trust.

(2) The doctrine of *cy-pres* applies. See pp. 73–74, *infra*.

(3) The ordinary rule of law against *perpetuities* does not apply to charities.[2] S. 18 of the Transfer of Property Act is to the same effect. It says that the rules laid down in ss. 14, 16 and 17 of that Act do not apply to charities.

(4) **Defects in conveyancing** are supplied, i. e., even an imperfect conveyance which will not be executed in case of a private individual is perfected and executed in case of a charity, where the donor has capacity and disposable estate.[3]

(5) There will be *no resulting trusts.* This would properly come under *cy-pres.* Where a person expresses general intention but particularises no objects or mentions objects which do not exhaust the whole proceeds, the property or the surplus will be devoted to charitable objects or to objects similar to those mentioned, as the case may be, and will not revert to the original settlor, provided there is an absolue mention of charity; similarly where the income from the fund increases.[4]

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1 Morice v, Bishop of Durham, [1899] 1 Ch. D. 21; Pocok v. Att Gen., 3 Ch. D. 372; Houston v. Burns, [1918] A. C 337.

2 Alt v. Strathden, [1894] 3 Ch. 265; Thomas v. Horell, L. R. 15 Eq. 198.

3 Sayer, 7 Hare. 377.

4 Att. Gen. v. Herrich Amb., 712; In Rymer, [1895] I Ch. 19.

(6) Formerly a **voluntary conveyance** to charities was held valid and exempted from the operation of 27 Eliz., c. 4; but now s. 173 of the Law of Property Act, 1925, sets charities on the same footing with private individuals in this respect, i. e., a voluntary conveyance of land whether to a charity or a private individual cannot be set aside except in case of actual fraud.

When charities less favoured.—(1) Assets were not marshalled in favour of charities in the absence of an express direction to that effect in the will, for that would otherwise contravene the provisions of the Mortmain Acts. But this is now done away with by the Act of 1891.

(2) The rule that a trust must be for a lawful purpose in effect applies more stringently to charities. Thus gifts for superstitious purposes are held void.[1] so also if they are against the moral and political sense of the country.[2] No such question as to the nature or character of the *cestui que trust* arises in case of a private trust. (*i*) Gift for saying masses for the *dead* is void. (*ii*) That for the suppression of vivisection would, according to the present tendency be valid.[3]

(3) Public charities may also be said to be in certain cases under particular disabilities as regards alienation of their property. Thus, for instance, in certain cases it becomes necessary to obtain sanction of the court before any trust property can be alienated. See s. 92, Civil Procedure Code.

Charities when treated on a par with private individuals.—(1) Equity would supply the *want of a trustee* when a testator gives his property on trust to a person as he shall name and he does not name him, or, if the one named by him dies, the court will appoint a trustee to

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1 Bourne v. Keane, [1919] A. C. 815.

2 Heath v. Chapman, 2 Drew 417.

3 Cross v. London Anti-vivisection Board, [1895] 2 Ch. 501.

discharge the duties of an executor.[1]

(2) *Lapse of time* would operate as a bar; but not as between an express trustee and his beneficiary. S. 10 of the Indian Limitation Act is to that effect.

(3) If the trust is for certain purposes, legal and illegal, legal objects are separated from illegal ones and the trust executed *pro tanto*, provided these are separable.[2]

Note.—(*i*) Where there is a gift upon trust for the joint or equal benefit of a charity and an individual, and both the charity and the individual are left indefinite, the whole gift will fail,[3] but not if the individual is definite though the charity be indefinite.

(*ii*) Where the gift is ambiguous, i. e., it can be construed both ways, for legal and illegal purposes, the legal interpretation will prevail—*Ut res magis valeat quam pereat.*[4]

(4) Trusts for *accumulation of income* are disregarded when the capital has been vested absolutely in the donee; the donee can demand immediate payment as soon as he is in a position to give a valid discharge. This is known as the rule in **Saunders *v.* Vautier**[5] and is equally applicable to legatees or donees who are charities as to legatees or donees who are private individuals.

The newly enacted s. 17 of the Transfer of Property Act, however, exempts charities from the rule against accumulation.

The doctrine of cy-pres.—This doctrine comes into operation in case of religious or charitable trusts. Where the execution of a charitable trust becomes inexpedient or impracticable the court will execute it *cy-prês*, i. e., as nearly as possible to the original purpose, that is, if the formal or

1. Moore, 21 Ch, D. 778.
2. Hoar v. Osborne, L. R. I Eq. 585; Chapman v. Brown, 6 Ves. 404,
3. James v. Allen. 3 Ver. 17.
4. "It is better for a thing to have effect than to be made void.
5. 4 Beav. 115.

particular purpose cannot be carried out, the court will approve a scheme which as nearly as possible executes the general intention. But this doctrine can apply only if there is a general intention of charity; so if the donor had only one particular object in view and none else, that failing, the doctrine would not apply; but if there is a general intention the failure of the particular form in which the charity is to be executed shall not destroy the whole. Besides if the testator chooses a charitable object which does not exist general charitable intention may be inferred.[1] In applying this doctrine, regard is to be had to the other objects of the testator's bounty, but primary attention should be had to the object akin to the original object.[2]

Thus the general rule is that where there is a general gift to general purposes of charity, that gift may be sustained on the doctrine of *cy-pres*, although the particular objects fail or are no longer in existence.[3]

In applying the *cy-pres* doctrine, the following three points may be noted:—

(1) The new purpose to which the property is to be applied must be in the nature of the particular purpose intended by the settlor.

(2) It must be impossible to carry out the charitable purpose for which the settlor made the particular gift.

(3) When the object is clearly indicated by the settlor and is capable of being carried out, the fact that the court thinks that a different mode of applying the trust funds would be more beneficial to the community is no ground for disregarding the express intention of the settlor.[4]

In cases of charitable bequests, the court has no right

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1 Re. Harwood 1936 ch. 285.
Re. Knox. 1937 ch. 109.
Re. Foster 1939 ch. 22.

2 Moggridge v. Thackwell 7 Ves. 69; Biscoe v. Jackson, 35 Ch. D. 460.

3 In re White's Trusts, [1886] 33 Ch. D. 453.

4 Strahan's Digest of Equity, p. 209.

to set aside the wishes of the testator and substitute another charity in place of the one directed to be established by him simply because it might not be so useful as some other that the court might substitute.[1] The duty of the court is to give effect to the charitable directions of the founder when they are not open to objection on the ground of public policy. The court does not consider whether those directions are wise or whether a more generally beneficial application of the testator's property might not be found.[2]

CHAPTER VII.

IMPLIED AND RESULTING TRUSTS.

An *implied trust* is one which, though not express, is founded on an unexpressed but presumed or implied intention of the settlor; and a *resulting trust* is one which is implied in favour of the person creating it or his legal representatives. They differ in this, that an implied trust is a genus of which a resulting trust is a species; i. e., all resulting trusts are implied, but all those that are implied are not necessarily resulting trusts.

Illustrations of implied trusts. —

(1) *A purchase or conveyance in the name of a third person*; the rule of equity in such a case is that the trust of legal estate results to a man who advances the purchase money. The test therefore is, " From whose purse did the considration flow. "[3] This device is often resorted to defraud creditors or to keep one's name secret. Where a person purchases property, real or personal, in the name of another or in the name of himself and another, there is a presumption

1 The Advocate-General v. Pardoonji, 13 Bom. L. R. 341.

2 In re Sir Currimbhai Ebrahim, Bart., 12 Bom. L. R. 1040; In re Weir Hospital, [1910] 2 Ch. 124, 131.

3 Dyer v. Dyer, 2 W. & T. 803.

that he intends such other person to hold it in trust for himself. So also where a person conveys property to another person[1] or to himself jointly with another person, there is a presumption that he intends such other person to hold it in trust for himself. But this is a mere presumption and in either case it may be rebutted or supported by evidence of surrounding circumstances. Thus, for instance, the court will not presume a resulting trust where the relationship between the parties at the date of the transaction was such as to impose a legal or quasi-legal obligation on the purchaser or transferor to provide for the other person. This is known as the *presumption of advancement*. The presumption of resulting trust can be rebutted by the *presumption of advancement* which is raised in favour of :—

(*a*) A legitimate (not illegitimate) child of the purchaser.[2]

(*b*) A person to whom the purchaser has placed himself in position of *loco parentis*; this may include anyone, even an illegitimate child,[3] nephew of a wife,[4] godson.[5]

(*c*) A wife of the purchaser,[6] but not a woman with whom he has contracted an illegal marriage,[7] nor if it is in the name of the wife and the purchaser himself, nor if it is in the name of a kept mistress.[8]

This presumption of advancement can in its turn be rebutted by oral evidence; only facts which are antecedent to or contemporaneous with the purchase may be put in evidence, and not the acts or declarations of the purchaser sub-

1 The Dharwar Bank, Ltd , v. Mahomed Hayat, 33 Bom. L. R. 250, 254.
2 Sidmouth, 2 Beav. 447.
3 Beckford Lofft, 490.
4 Currant v. Jargo, I Col. 261.
5 Standing v. Bowring, 31 Ch. D. 282.
6 Drew v. Martin, 2 H. & M. 130.
7 Soar v. Foster, 4 K. & J, 152.
8 Ryder v. Kidder, 10 Ves. 360

sequent to the purchase.[1] The presumption of advancement is not rebutted by the fact that the purchaser who was the father, subsequently to the purchase retained the property under his control and received the rents and profits and continued to do so even after the son had ceased to be a minor.[2] Where the son happened to be a solicitor for the father, it was held that the presumption, if any, was rebutted.[3] No presumption of advancement can be raised where the son has already been provided for.[4]

But no resulting trust is presumed in case of a mere voluntary conveyance, e. g., a gift, and there is no evidence of any contrary evidence. Thus if the case is not one of purchase of land by A in the name of B, but is the case merely of a conveyance by A to B of land vested in A,[5] the court will hold that the beneficial interest did pass to the transferee.

In India ss. 81 and 82 of the Trusts Act provide for this class of cases. When property is transferred or bequeathed to a person but no inference can be drawn from attendent circumstances of any intention to dispose of the beneficial interest therein, the transferee or legatee holds it upon trust for the transferor; similarly when property is transferred to one person and the consideration is advanced by another.

Benami transactions come under this class of resulting trusts; there the same test in applied; " From whom did the consideration actually proceed. " The burden is on the nominal purchaser to prove that he was entitled to beneficial ownership.[6]

The rule as to the presumption of advancement does not prevail in India,—No exception has ever been engrafted by the Indian law negativing the presumption of resulting trust

1 Williams v. Williams, 32 Beav. 370.

2 Grey, 2 Swanst, 594.

3 Garett v. Wilkinson, 2 Deg & Sm, 244.

4 Hepworth, L. R. 11, Eq. 11.

5 Fowkes, L R. 10, Ch. A. 343.

6 Naginbhai v. Abdulla. 6 Bom. 717.

in favour of the person providing the purchase-money, such as has, by the Courts of Chancery, in the exercise of equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England.[1] The reason being that a widespread and persistent practice prevails amongst the people of India, whether Hindus or Mahomedans. for owners of property to make grants and transfers of it *benami* for no obvious reason or apparent purpose and without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred.[2]

(2) **Unexhausted residue.**—Where property is given upon trust which fails either wholly or in part or does not exhaust the whole property, there is generally, but not invariably,[3] a trust resulting in favour of the settlor, and if he be dead, in favour of his representatives; but not if the person who is to take dies after the trust has once come into operation. It must be noted in connection with this that a trustee cannot take beneficially the unexhausted residue, even though there be none else in whose favour it can result;[4] it would go to the Crown by escheat in preference. But an executor can so take beneficially as against the Crown.[5]

Section 83 of the Indian Trusts Act recites the principle in much the same words. Where a trust is incapable of being executed or where the trust is completely executed without exhausting the trust property, then the trustee is,

1 Kerwick v. Kerwick, 23 B. L. R. 730 (P. C.); Gurauditta Vs. Ramditta 55 I. A. 235 followed in 33 Bom. L. R. 254. and 71 I. A. 197.

2 Gopiekrishnu gossain v, Gangaprasad Gossain, (1854) 6 M. I. A. 53

3 Pernell v. Hinston, 3 S. & M , Giff. 344; Cooke v. Smith, (1891) A, C. 297.

4 King v. Denison, V. and B. 272,

5 Re Wood, (1896) 2 Ch. 596.

in the absence of a direction to the contrary, to hold the trust property (or the portion unexhausted) for the benefit of the author of the trust or his legal representatives. Thus if a Hindu by his will appoints executors trustees of his whole estate and the bequests in the will are not sufficient to exhaust the whole, the executors would become trustees of the undisposed of residue for the next of kin of the testator [1]

(3) **Conversion.**—Resulting trusts may also arise under the doctrine of conversion; see ." Conversion. "

(4) **Resulting trusts arising out of joint tenancies.**—*Equity follows the law* and in equity also in case of joint tenancies on the death of one joint tenant there would be devolution to the survivors as in law. But equity strongly leans against joint tenancies and is in favour of presuming tenancy in common. Slightest circumstances are considered sufficient by a court of equity to treat the tenancy as one in common; in such a case the survivor is treated as a trustee for the representatives of the deceased. The following rules may be noted:—

(*a*) A joint advance of purchase-money in unequal proportions appearing on the deed itself, will be deemed to create a tenancy in common.

(*b*) A joint advance on mortgage in in equal or unequal proportions will be treated as a tenancy in common, even though the mortgage-deed expressly says it is joint.

(*c*) Joint commercial purchases are deemed to be tenancies in common.

(*d*) Lands devised to joint tenants who treat it as partnership assests will be deemed to be held in common.

In India the law on the point is stated stated in s. 45 of the Transfer of Property Act which lays down that tn the aasence of evidence as to the interests in the fund to which the purchaser are respectively entitled or as to the shares in

1 Lalubhai v. Mankorbai, 2 Bom. 388; Cursondas V. Vandravandas. 21 Bom. 664.

which they are respectively advanced, the persons are presumed to be equally interested in the property, i. e., the section in effect does away with the doctrine of joint tenancy.

(5) **Illegal transfers.**—There is a resulting trust in case of illegal transfers where the purpose is not carried out or the transferor is not as guilty as the transferee, i.e., where the parties are not *in pari delicto* ; so also if the effect of permitting the transferee to retain property might be to defeat the provisions of any law; similarly in case of bequests for illegal purpose or where revocation of a bequest is prevented by coercion.[1]

Sections 84 and 85 of the Indian Trusts Act lay down similar rules. When considering such cases, the application of the maxim "*In pari delicto potir est conditio possidentis*"[2] must not be overlooked. A executed a sham deed of conveyance of his immovable property in favour of B in order to defraud his creditors and put B in possession of the property. A's creditors thereafter not knowing that A had any immovable property compounded their claims and accepted two annas in a rupee in respect of their claims. A subsequently brought a suit against B for possession of the property. It was held that the fraud having been carried out there was no equity in favour of A and A could not recover the property.[3]

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1 Gascoigne v. Gascoigne. 1918 1 K. B. 223; Symes v. Hughes, Eq. 475; Reynell v. Sprye, 1 De G. M. & G., 660.

2 "Where each party is equally in fault the law favours him who is actually in possession."

3 Chenvirappa v. Puttappa 11 Bom. 708; GUDDAPPA v. Balaji I. L. R. 1941 Bom. 575.

CHAPTER VIII.

CONSTRUCTIVE TRUSTS.

What is a constructive trust ?—"It is a trust raised by construction of law to meet the requirements of equity without any reference to any presumed intention."[1] There is neither an express nor implied intention on the part of the transferor to create a trust. It arises from a consideration of what is just and right—irrespective of any intention; and the court of equity calls upon a person in possession of the property to hold it for the benefit of another.

Advantage gained by a person in fiduciary position, using his position for his own purpose.—Whenever such a person, e g., an executor, guardian, agent, director, promoter of companies, etc., either directly or indirectly, avails himself of his position to make profit or gain an advantage, he will in equity be a trustee for such profits or gain, and accountable for the same. The leading equity case, **Keech v. Sandford,**[2] known as the Romford market case, illustrates this. It was there held that a trustee or executor renewing the lease in his own name and for his benefit shall hold the same upon trust for the person entitled to the old lease even though the lessor may have refused to grant a renewal to the *cestui que trust;* similarly, if it is by a tenant for life,[3] or by a partner.[4] The trustee has of course a right to be indemnified from covenants in the lease and if there be additional lands in the new lease, the trust will not attach to these. This rule applies to renewable leaseholds and not to purchase of reversion.[5] Where a fiduciary or quasi-

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1 Soars v. Ashwell, [1893] 2 Q. B. 336.

2 Keech v. Sandford, [1726] Cha. Ca. 61; for facts of this case see Appendix giving the leading cases.

3 Lord Ranleigh's will, 25 Ch. D. 590.

4 See s. 16, Indian Partnership Act. Also see Featherstonehaugh v. Biss, [1903] 2 Ch. 40; Clegg v. Edmundson, [1857] 8 D. M. G. 787.

5 Bevan v. Webb, [1905] 1 Ch. 620.

fiduciary relation has existed, courts of equity have invariably placed the burden of sustaining the transaction upon the party benefiting by it, requiring him to show that it was of an unobjectionable character and one which ought not to be disturbed. The exercise of this beneficial jurisdiction is not confined to particular relations but the relief thus granted stands upon a general principle, applying to all the varieties of relations in which dominion may be exercised by one person over another,[1] such as an agent and a principal a mortgagor and a mortgagee and a partner and a partner.

The Indian Trusts Act comprises these rules of English law and they are formulated in ss. 87, 88, 89. S. 87 refers to a debtor becoming the executor of his creditor, in which case he has to hold the debt for the benefit of the persons interested therein. This is because as an executor he occupies a fiduciary position in respect of the creditor's estate. Ss. 87–88 deal with a trustee, executor, partner, agent, director of company, guardian, legal adviser or any other person bound in a fiduciary character to protect the interests of another. The trust is raised only if the advantage is obtained by the person by availing himself of his character, or where the dealings are entered into under circumstances in which his own interests are adverse to that other's. This is on the principle that a person in a fiduciary position should not do anything which might place him in a position inconsistent with the interests of the trust.

Illustrations to sections 88 and 89 of the Indian Trusts Act very clearly explain these rules. Directors of companies cannot buy the property of the company and then sell it at advanced price.[2] An executor cannot buy from a legatee at an undervalue the latter's claim under a will. A guardian cannot purchase his ward's property and sell at an advanced price ; if he does so the profits belong to the ward.

1 Huguenin v. Basley, 2 W. & T. Reiger vs. Campbell 1939 ch. 766; Nelson vs. Hannam. 1°43 ch 59.

2 Laxemburg v. Magay, 25 Beav. 586.

S. 90 of the Indian Trusts Act recities the same rule for tenant for life, co-owner. mortgagee or other qualified owner of any property gaining an advantage by availing himself of his position as such ; but he is entitled to payment by such persons interested of their due share of the expenditure incurred.

If a mortgagee is in possession he is a constructive trustee of the rents and profits[1] ; similarly if he allows the estate to be sold for default of payment of revenue and purchase it bimself.

Improvements made by limited owners.-Where a person acting *bona fide* permanently benefits the estate of another by repair or improvements, such a limited owner is in equity entitled to the expenses if the improvemsnt is useful and necessary. Equity in such cases creates a trust against the real owner who is bound to do equity, i. e., make allowance for necessary expenditure incurred by that other *bona fide.*[2] The trustee who renews a lease has a lien upon the estate for the expenses of the renewal.[3]

There is no equity in favour of a person who lays out money on the property of another with full knowledge of the state of the title,[4] or who lays out money unnecessarily or improperly.[5]

Ss. 86, 91, 92, 93 and 94 of the Indian Trusts Act recite some more cases where constructive trusts are created.

S. 86 speaks of a case where property is transferred in pursuance of a contract liable to rescission on the ground of fraud or mistake.

S. 91 speaks of a person acquiring property with knowledge that another has entered into an existing contract relating to it.

1 Coffring v, Cooke, 1 Ves 270,

2 Nicholson v. Hooper, 4 My. Cr. 186; Romley v. Ginmiener, (1897) 2 Ch. 503.

3 Naddy v. Hall, 3 ch. D. 329.

4 Ramsdon u Dyson, L. R. I H L. 129.

5 Pole, 2 Deg. S. & M. M. 420.

S. 92 deals with the case of a person contracting to buy property to be held on trust for certain beneficiaries.

S. 93 deals with the case of a creditor who on debts being compounded with all creditors of the debtor, gains an additional undue advantage.

S. 94 relates to a person in possession of property not having whole beneficial interest therein.

Prob.—A, B and C were the mortgagees in possession of an estate; A acted as solicitor for the others in the transaction and sold under the power of sale in the mortgage-deed to a company formed for the purpose of purchasing the property; A had been instrumental in promoting the company, acted as its solicitor, and was a shareholder in the company; B and C coming to know of this seek to set aside the sale. Will they succeed?

A.—No; the sale cannot be set aside merely on the ground that A was a shareholder in the purchaser-company, for a sale by a person to a corporation of which he is a member is not, in law, a sale by him to himself along with other people; the burden may be placed on the company to prove the *bona fides*, and if the evidence shows that the price was adequate and that proper care was taken to secure a purchaser at the best price, no order can be passed to set aside the sale.[1]

Prob.—L was employed as an agent by M, the owner of two bungalows in Poona, to sell them in Bombay, naming the minimum price for them. L bought the bungalows for himself at the stated minimum price and resold them for a larger sum without M's knowledge. M subsquently comes to know of it and comes to you for advice.

A.—The principle of Fox v. Macreth, 2 W. & T., applies. L is a constructive trustee of profits made by him in the transaction. M can bring a suit against L to recover the profits for which L must account. S. 89 of the Trusts Act applies to the case.

1 Farrar v. Farrar & Co., 10 Ch D, 395.

Unpaid vendor's lien.—It is the right which an unpaid vendor has for purchase-money against the vendee, volunteers and purchasers with notice claiming under him, unless relinquished. This lien is non-possessory and equitable forming a charge on land itself for the unpaid purchase-money or any part of it, and is created by equity irrespective of the intention of the vendee. It is, in short, to prevail against every one except a purchaser for value without notice. This comes under the class of trusts called constructive trusts, of which it affords a leading instance.

The lien *can be enforced against*—

(1) The purchaser and his heirs.

(2) Subsequent purchasers with notice.

(3) Purchaser without notice having an equitable title only.

(4) A trustee in bankruptcy.

(5) But not against a *bona fide* purchaser without notice who has the legal estate.[1]

A vendor's lien may be lost—

(1) If it is waived or abandoned by the vendor; e. g., by taking another security with intention of substituting it for his lien; but if he takes merely a collateral security, viz a bond for purchase-money or promissory note, bill of exchange, etc , it will not of itself discharge the lien.[2] The test is, " Is the security substitutive of or cumulative with the lien ? " In the one case the lien is lost; in the other, it is not.[3]

(2) By vendor's negligent conduct.[4]

(3) By efflux of the statutory period.

(4) By laches.

S. 55 (4) (b) of the Transfer of Property Act provides for the vendor's lien.

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1 Collins, 31 Beav. 346.

2 Nives v. Nives, 15 Ch. D. 649,

3 Buckland v. Pocknell, 13 Sim. 406,

4 Rice v. Rice, 2 Drew. 73.

Vendee's lien.—Similarly (in rare cases) when the purchase-money is paid prematurely, the purchaser has a charge analogous to the lien of the vendor (in the contrary case) on the land; so also if the purchase goes off through no fault of his.[1] This lien extends against the like persons against whom the vendor's lien can be enforced (even as against a subsequent mortgagee with notice).[2]

S. 55 (6) (b) of the Transfer of Property Act provides for the vendee's lien.

CHAPTER IX.

DUTIES OF A TRUSTEE.

The degree of care required of him.—Investments made by trustee.—Breach of trust,—Payment of interest as damages.—Remedies of a beneficiary.—Remedies when barred.—Liability of trustee for default of co-trustee.—Contribution.

Duties of a trustee.—These are stated in ss. 11 to 20 of the Indian Trusts Act.

(1) He must execute the trust, i. e., fufil the purpose of the trust and obey the directions given except as *modified* by the consent of beneficiaries competent to contract, or, when express obedience to the directions would be impracticable, illegal or injurious to the beneficiaries. (S. 11.)

Note:—(i) If it is for payment of debts, he has to pay only those that are recoverable ones.

(ii) If he is authorized to sell by auction, he cannot sell by private contract.

(iii) If loss is caused, the trustee would be liable for deviating from express directions.

(iv) If he has to invest in a particular security only, he cannot invest in any other though included in s. 20.[3]

1 Dina v. Grant. 5 Deg. & Sm. 451.
2 Whitbrad v. Watt, (1902) 1 Ch. 835.
3. Oney. (1900) 2 Ch. 524.

(2) He must inform himself of the state of the trust property; thus if the trust property is a debt outstanding on personal security, and the deed leaves no discretion to leave it outstanding, he must recover the debt without delay.[1] He has to get in money invested in unauthorized or hazardous securities. He is not liable if he could not possibly be acquainted with facts from the papers and materials at his disposal.[2]

(3) He must protect the title to the trust property, i. e., he must bring and defend all necessary suits and take all possible steps to preserve the trust property, e. g., he must get a document registered if necessary.

The English law on the subject is very nearly the same. The first and foremost duty of a trustee is to acquaint himself with the terms of the trust and the state of the trust property and all the affairs affecting the trust property that comes into his possession or under his control. He must take all reasonable and proper measures to obtain possession of the trust property and to get in all debts due to the trust estate. He should not allow money to remain outstanding on personal security, however good, unless expressly authorized to do so[3]; another important duty that is demanded of a trustee is his fidelity to the trust. He must strictly conform to and carry out the terms of the trust and should not deviate from the strict letter of the trust except when he thinks such deviation to be necessary or beneficial. He may be relieved from observing the directions by the consent of all the beneficiaries if competent to give such consent or by an order of the court or by statute or where the directions are illegal.

(4) He must not for himself or another set up any title to the trust property adverse to the interest of the beneficiary.[4] No person who has accepted the position of trustee and has acquired property in that capacity can be permitted to

1. Lawson, 2 B. C. 156.
2. Heanney v. Oliver, 57 L. T. 239.
3 Re Laing, (1894) 1 Ch. 595, Re Grindley, (1898) 2 Ch. 593.
4 S. 14, I. T. Act.

assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself.[1] He must assume the validity of a trust until it is actually impeached. If the trust is invalid, the beneficiaries may set up their claim against the trust, but it does not lie in the mouth of the trustee to do so.[2]

(5) He must exercise *reasonable care.* In India the standard is that of an average prudent man; that is a trustee must act as a reasonable prudent person would deal with his own property. His discretion is subject to control by the principal Civil Court of original jurisdiction. Ss. 15, 36 and 49 of the Indian Trusts Act recite these rules. It is for the trustee to prove that he exercised reasonable care. The liability is the same whether the trust is gratuitous or for remuneration.[3] The measure of prudence required of a trustee by s. 15 must be regulated by any specific provisions applicable to special matters found in the other sections of the Act.[4]

In England, the courts of equity distinguish between the duties imposed upon and the discretion invested in the trustee as such. As regards duties, utmost diligence is the only protection against liability. No circumstances of mere hardship will help him[5]; thus (1) mixing trust property with one's own[6]; or (2) allowing it to remain entirely with a co-trustee,[7] would be a breach of duty ; as regards *discretion*, the standard is the amount of diligence he would bestow on his own property, thus investing trust money on a contributory mortgage would be a breach of duty.[8]

1 Srinivasa v, Venkatavarada Iyangar, 13 Bom. L. R. 520, 530,

2 Ardeshir v, Bai. Sirinbai, 1 Bom. L. R. 721.

3 Jobson v. Palmer, (1893) 1 Ch. 71.

4 Neelam Tirupatirayudu v. Vinjamuri Lakshmi Narsama, 38 Mad. 71.

5 Caffrey, 6 Ves. G. 488.

6 Re Hallet, Ch. D. 696 ; Lipton v. White, 15 Ves. 432.

7 Scotket v- Lower, 29 Ch. D. 535.

8 Webb v. Jonas, 39 Ch. D. 660.

If due diligence is used a trustee is not liable for accidental loss, e.g., by robbery,[1] or depreciation of securities,[2] or default of a properly appointed agent, or if bills drawn by persons of good credit are dishonoured and the money remitted by trustee by such bills is not recovered.

Prob.—A, a trustee, employed B, a broker of standing and reputation, to procure some bonds as an investment of trust funds; the broker, according to thè rules of the stock exchange, sent in a contract note and A paid the purchase-money to B to be given to the vendor, but before the bonds were obtained B became insolvent. Discuss the liability of A.

A.—In this case A has done what any man of average prudence would have done in managing his own estate, and so he cannot be held liable for the loss of money due to B's insolvency; but the result would be different if A, instead of giving the money temporarily to B to be paid over to the purchaser, had allowed the sum to be with B as a fixed deposit for a long time; in that case, on the principle of *Cann's* case,[3] the trustee would be liable.[4]

Prob.—Certain trustees, empowered to invest on mortgage, lend a sum of Rs. 2,500 out of trust funds in their hands on a mortgage of land and houses valued at Rs. 8,000 by a valuer selected by their own solicitors The mortgagor afterwards becomes bankrupt and the property does not realize the sum advanced. How far are the trustees liable for the loss so caused?

A.—According to s. 15, trustees are bound to use due diligence for themselves. They ought to have seen for themselves and not absolutely to have relied upon the opinion of the valuer: the trustees themselves ought to have chosen the

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1 Swinfen, 29 Bav. 211.

2 In re Chapman, (1896) 2 Ch. 7.

3 Cann v. Cann, 33 W. R. 40.

4 Speight v. Gaunt, L. R. 9 A. C, 1.

valuer : again, s. 47 prevents a trustee from delegating his office except that he can engage a bailiff, or agent for ministerial purposes. Any purpose requiring exercise of skill must be done by the trustee himself. It was no business of the solicitor to choose a valuer. Trustees are liable for the loss, their act being a breach of their duty as trustees.[1]

(6) **He must convert perishable security.**—Section 16 of the Indian Trusts Act lays down that when a trust is created for the benefit of several persons in succession and the property is of a wasting nature, or is a future or reversionary interest, the trustee must, in the absence of any intention to the contrary in the trust instrument, convert it into that of a permanent or immediately profitable character. The duty to convert will not arise if there is a specific bequest.

The same rule applies in England.[2] There need be no conversion if it can be gathered that the intention of the settlor was that property should be enjoyed *in specie*, e. g., leaseholds are bequeathed specifically and not by way of residue.[3] The onus of proving this is on the trustee.

(7) **He must be impartial.**—This is when there are more beneficiaries than one; he cannot execute the trust for the advantage of one at the expense of another. He should not pay one beneficiary befor paying another. He should not favour a tenant for life by investing in more productive but less secure property.[4] It is his duty to hold the scales evenly between the parties having an interest in the trust. He must not be a partisan of one of several beneficiaries. (S. 17).

(8) **He must prevent waste.**—This has to be read with s. 16. This is where trust is created for the benefit of persons in succession and one of them is in possession (S. 18.)

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1 Fry v. Tapson, 38 Ch. D. 268.

2 How v. Dartmouth, I. W. & T. 68; Brown v. Gallatly, 2 Ch. Ap. 751; Nixon v. Sheldon, 39. Ch. D. 50.

3 Gawlen. 33 Ch. D. 523 ; Ward v. Thomas, (1891) 3 Ch. 482.

4 Stuart, 3 Beav. 430.

(9) **He must be ready with accounts.**—S. 19 requires a trustee to keep clear and accurate accounts, and at all reasonable times to furnish the beneficiary, if the latter desires, full and accurate information as to the amount and state of the trust property. The trustee is of course in his turn entitled under s. 35 to have his accounts settled and examined on completion of his office, and to an acknowledgment from the beneficiary if nothing is due by him to the trust. It is no defence for him to say that he is illiterate or incapable of keeping acounts. When a trustee cannot produce the fund which he holds for the benefit of another, *prima facie* he is liable for the loss that thereby occurs.[1]

In England, the beneficiary is entitled to full information, and the trustee to a release; but the account so settled may, if necessary, be *reopened* on certain grounds, i. e., liberty is given to surcharge, showing an omission for which credit ought to have been given, or falsify—prove an item to have been wrongly inserted. The duty of giving information is confined to the case of a beneficiary to whom only the trustee is under an obligation. He need not answer inquiries of a third party as to whether the beneficiary has encumbered his interest; but if he does he should state what he believes to be true.[2]

Trustees' liability to account.—The trustees are liable not only to account for the moneys that have actually come into their hands but also for moneys which might have come into their hands if they had acted with due diligence.[3] In an action for an account against a trustee, the court will direct a common account with liberty to the beneficiary to surcharge and falsify. When an account is sought to be directed on the footing of wilful default, the

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1. Lakhmichand Nemchand v. Jayakuarbai Nemchand, 6. Bom. L. R. 907.

2. Low v. Boverie, [1891] 3 Ch. 99.

3. Vasudevan Adisupad v. Bhawadasan Nainbundiri, [1934] Madras A. I. R. 115, 119.

plaintiff must allege some specific act of wilful default, and at the hearing must prove some act of wilful default or at least establish a case for inquiry.[1]

(10) **He should invest only in authorized securities.**—A trustee is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. It is the duty of a trustee to confine himself to the class of investments which are permitted by the trust instrument or s. 20 of the Indian Trusts Act and avoid all investments which are attended with hazard.[2] Ordinarily the court would not, apart from any special investment clause in the instrument of trust, sanction a change of investment into any securities other than those mentioned or referred to in s. 20.[3] Under s. 20 a trustee can invest in any of the following:—

(*i*) Promissory notes, debenture-stocks or other securities of the Indian Government or of the United Kingdom of Great Britain and Ireland.

(*ii*) Bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India.

(*iii*) Stocks, debentures or shares in railway or other campanies, the interest whereof is guaranteed by the Secretary of State for India in Council.

(*iv*) Debentures or other securities for money issued by or on behalf of any municipal body under the authority of any Act of legislature established in British India.

(*v*) *First mortgage* of immovable property in British India, provided that the property is not leasehold for a term of years and that the value of the property exceeds by one-third, or if consisting of buildings exceeds by half, the mortgage-money.

(*vi*) Any other security expressly authorized by the trust instrument or any rule which the High Court may from time to time prescribe in this behalf.

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1. Lewin, p. 947.

2 In re Cassamali Javerbhai, 8 Bom, L. R. 883, 884.

Investment in cls. (*iv*), (*v*) and (*vi*) should not be made without the consent of a person who is competent to contract and entitled in possession to receive the income of the trust property for his life or any greater interest.

Note.—(*i*) These rules apply where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust.

(*ii*) If there is a specific direction in the trust-deed to invest in a particular security, that must be followed.

(*iii*) Even where the trust-deed gives a discretion to invest where he thinks fit, the trustee cannot do it in any security not covered by s. 20.

(*iv*) He can *invest* only, and not employ it in trading or business speculation.[1]

(*v*) He cannot lend on a personal security.[2]

(*vi*) Rules framed by the High Courts authorize trustees to invest in some other securities, e. g., Improvement and Port Trust bonds, etc.

(*vii*) He should not join a contributory mortgage[3] nor invest in an equitable mortgage.[4]

(*viii*) If trust money does not exceed Rs. 3,000 he can deposit in Government Savings Bank.

(*ix*) If the trustee invest beyond the limit in cl. (5) of s. 20 he is liable for the loss, only for excess invested.[5]

(*x*) Though ordinarily a court cannot sanction an investment not covered by the instrument of trust or s. 20, the court does, in England, in

1 Harris, 29 Beav. 107.
2 Child, 20 Beav. 502.
3 Webb v. Jonas, 30 Ch D. 660.
4 Lokhart v. Reilly, I Deg. & S. 475.
5 Lake (1903) I K. B. 439.

case of emergency, sanction such investment with proper safeguard.[1]

In England this is governed by the Trustee Act of 1925, s. 1. The latitude is much the same. In case of investment on the security of property, the trustee has to be satisfied from the report of a properly qualified officer as to the actual value thereof. The fact that the trustee believed the borrower to be a substantial man is no defence. The burden is on him to prove that the investment was proper. Investment in real securities does not mean purchase of land; but a mortgage is included. A trustee cannot carry on the testator's business unless so directed by the will; in that case, i. e., if authorized, the trustee is entitled to be indemnified for the trade debts out of the property of the testator set apart for the business.[2]

How far the court can exercise control over trustees.—The court has a general controlling power over trustees. Where the trustee has a discretionary power, the court has no authority to control it if it is exercised reasonably and in good faith[3]; but where a discretionary power is not exercised reasonably and in good faith such power may be controlled by a principal Civil Court of original jurisdiction.[4]

What constitiutes a breach of trust.—Any act by a trustee in reference to the trust property in contravention of the duties imposed on him by the trust, or in excess of those duties, and any neglect or omission on his part to fulfil those duties and the concurrence or acquiesence by one of several trustees in a similar act, neglect or omission on the part of a co-trustee constitutes a breach of trust.[5] For such breach of trust the trustee is personally liable and after his death his estate becomes liable.

1 New, (1901) 2 Ch. 534.
Tollemach (1903) 1 ch. 457

2 Arnold v. Smith, (1896) Ch 171.

3 S. 17, I. T. Act.

4 S. 49, I. T. Act.

5 Halsbury's Laws of England, Vol. XXVI, p. 184.

The trustee may be relieved from liability by provision in the trust-deed, or by statute, or when the breach has been occasioned by necessity or when it has been authorized or condoned by the *cestui que trust* injured thereby or when it has been due to an innocent mistake.[1]

In India, a breach of any duty imposed on a trustee as such by the law, i.e., ss. 11 to 20 of the Indian Trusts Act, is a " breach of trust. " Even the mere failure to execute the trust, i.e. remaining passive after it has once been accepted, would be a breach. In case of breach he has to make good the loss caused to the estate thereby. It may be noted that equity in no case sets a premium upon a breach by the trustee; thus if there be two breaches and one of them causes a gain and the other a loss to the trust property, he would be liable for the loss, and cannot set off the loss against the gain ; but he can if the gain and the loss are in the same transaction.[2] Ordinarily he has to account for the whole gain and make good the whole loss. If he wrongfully sell stock and apply it for his own purpose, the measure of his liability is the amount necessary to replace the stock.[3] The trustee has to pay damages, but he has, in addition, to pay interest in some cases.

Interest in addition to damages for breach of trust.—Interest has to be paid by trustee in the following cases:—

(1) Where he has actually received it, he must account for the sum so received.[4]

(2) Where he has committed delay in paying trust money to beneficiaries.

(3) Where he ought to have received interest, but in fact he has not.

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1 Ibid, p. 185.
2 Fletcher v. Green, 33 Beav. 426.
3 Sadler v. Lea, 6 Beav. 824.
4 Emmot, 17 Ch. D. 142.

(4) Where he is presumed to have received it, *viz.*, if he has employed trust property in private trade or business; the beneficiary in that case has the option to claim trade profits so made.[1]

(5) Where he is guilty of direct breach or gross misconduct, e.g., failure to invest the money properly or to accumulate interest thereon. He would, in *India*, be liable to account for compound interest with half-yearly rests at the same rate; and in *England*, if securities are sold for so doing, the trustee has at the option of the beneficiary to replace the securities with intermediate dividends and interest thereon or to account for the proceeds with interest.[2]

(6) So also where he employs trust property in trade or business. The beneficiary has the option either to demand compound interest or net profits so made. But it must be shown that the trustee called in trust money for the purpose of employing them in the trade or speculation. Mere neglect to withdraw funds already employed by the settlor in the trustee's trade is not enough.[3]

Rate of interest.—In India generally the rate is 6 per-cent simple per annum, in cases (2), (3), (4); but in cases under cls. (5) and (6) the trustee will have to pay compound interest. In England the rate now allowed is 4 per cent.[4] But higher rate, i. e. 5 per cent., is allowed in cases under cls. (5) and (6) and sometimes compound interest also is allowed.[5]

Remedies of beneficiary in case of breach of trust.—(1) He can hold the trustee personally liable. The personal liability of the trustee, in case of more trustees than one, is joint and several; in case of fraud even a bankrupt trustee is not discharged.[6]

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1 Jones v. Foxal, 15 Beav. 392.

2 Robinson, 1 Deg. M. G. 247.

3 Vyse v. Foster, L. R. 7 H. L. 318.

4 In re Barclay, (1899) 1 Ch. 674.

5 Jones v. Foxal, 15 Beav. 392.

6 Mora v. Brumt, (1896) 1 Ch. 193.

(2) Right of following the trust estate into the hands of any alienee except as against *bona fide* purchaser for value without notice, who has the legal estate. In English law also the purchaser must be *bona fide* and for valuable consideration and he must not have notice; else he is not protected.[1]

Under s. 63 of the Indian Trusts Act the beneficiary can follow the trust property—(*a*) into the hands of a third person where it has come into his hands inconsistently with the trust; but he cannot follow that property in the hands of a transferee in good faith for valuable consideration without notice either when the purchase-money was paid or when the conveyance was executed, or (*b*) in the hands of a transferee for consideration from such transferee; he cannot follow money, currency notes and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in circulation, and the liability of a man to whom the debt or charge is transferred is not affected.

Note.—(*i*) A judgment-creditor of a trustee attaching and purchasing trust property is not a transferee for consideration.[2] (Ss. 63-64.)

(*ii*) The beneficiary can require the transferee either to admit formally that the property is comprised in the trust, or sue for that declaration.

(*iii*) If the transferee is a volunteer it can be followed in his hands whether he has notice or not.[3]

(*iv*) A purchaser without notice from a purchaser with notice is protected, for his own *bona fides* is a good defence.[4]

(*v*) As between a trustee and beneficiary, a suit to follow the trust property cannot be barred by lapse of time.

1 Thorndike v Hune, 3 D. and J. 56; Daniels v Davison, 16 Ves. 249.
2 Dayal v. Jivraj, 1 Bom. 237.
3 Spurgeon v. Collier, 1 Edn. 55; Mansel, 2 P.W. 678.
4 Martins v. Joliff, Amb. 313.

(*vi*) The beneficiary can follow only movable property; but not if it is money or negotiable instrument, the property in which has passed by mere delivery.

(*vii*) If the trustee make good the loss caused by breach of trust out of his estate even if immediately before his bankruptcy, the trust estate can retain the benefit; it is no fraudulent preference.[1]

(3) Right of following the property into which the trust fund has been converted so long as it can be traced in his hands or in that of his legal representative or legatee.[2] Thus where a trustee wrongfully invests the trust funds in the purchase of land, the beneficiary would be entitled to the land.[3]

(4) Where a trustee re-acquires trust property wrongfully converted, the property again becomes subject to the trust notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

(5) The charge on the whole fund when the trustee wrongfully mingles the trust property with his own. In England in such a case the beneficiary will be entitled to all which the trustee cannot prove to be his own. In India he has a charge only.[4] The charge is to the extent of the amount due to the beneficiary.[5]

(6) **Right of impounding.**—*In England.*—Where a trustee commits a breach of trust at the instigation of a beneficiary, the court may impound the interest of the beneficiary by way of indemnity to the trustee, and if he has done it of his own accord and if he has an equitable (beneficial) interest in the property, such interest will be impounded by the court till the default is made good. This right would take precedence even over the right of the

1 Lister v. Stubbs, 45 Ch. D; Gray V. Johnstone, L. R. 3 H. L.

2 Lake, [1901] I K. B. 710.

3 I. T. Act, s. 63, ill. [a].

4 I. T. Act, s. 66; In re Hallett, (1894) 2 Q. B. 237; Ghosh v. Macintosh 4 Cal. 908; Hopper, L. R. Eq. 549.

5 In re Decowie. 6 Cal. 70; Lupton v. White, 19 Ves. 432.

mortgagee of such interest.[1]

Note.—(*i*) Impounding means not allowing the person entitled to beneficial interest to receive any part of the trust fund until he has made good the breach of trust.

(*ii*) Only equitable interest can be impounded ; legal interest cannot be impounded.

(*iii*) If a trustee committing a breach of trust is a partner in a firm, and he wrongfully employs trust property in the business of the firm, only those partners, and not all, that have notice of the breach of trust are liable jointly and severally.

Section 68 of the Indian Trusts Act Provides that where one of several beneficiaries (not being a *feme covert* without power of anticipation) commits a breach of trust by joining in the breach, or knowingly by obtaining advantage prejudicially to other beneficiaries, or concealing the knowledge of the breach by trustee, or deceives the trustee, his interest in the estate shall be impounded as against him and those claiming under him until the loss is made good, but not as against *bona fide* transferees for valuable consideration.

Remedies of beneficiary when barred—*English law.*—The liability of a trustee to the beneficiary for breach of trust continues till the beneficiary's right of action is lost by (1) continued acquiescence or (2) concurrence therein or (3) subsequent confirmation or (4) release.

The acquiescence, concurrence, confirmation or release would be binding on the beneficiary only when he had full knowledge of the facts and was *sui juris.* The remedy of the beneficiary is also lost by laches except where the action is for fraudulent breach of trust and the trustee was a party to the fraud or where the claim is to recover trust property retained by the trustee or to recover property previously received and converted to his own use.

Section 23 of the Indian Trusts Act recites these circum-

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1 Bolton v. Curee. (1895) I Ch. 544. Also see English Trustee Act, s. 45,

stances in much the same form. viz:—

(*i*) Where beneficiry has by fraud induced the trustee to commit a breach of trust.

(*ii*) The beneficiary has concurred in it, being competent to contract, and without coercion or undue influence.

(*iii*) He has subsequently acquiesced in the breach with full knowledge of the facts and of his right.

Liability of a trustee for the default of his co-trustee.—A trustee is not liable for the default of his predecessor ; he is not even liable for the default of his co-trustees except under certain cirumstances. In English law this question is discussed in the leading cases of **Townley** *v.* **Sherbone** and **Brice** *v.* **Stokes**. Where there are co-trustees the office is a joint one and so they have necessarily to join in conveyances and receipts ; but it is not that all receive money though they join for the sake of conformity. Thus it cannot invariably be inferred that a particular trustee joining in the receipt has received the money ; but it is not so with executors for each of them is entitled individually to give a receipt. In their case if they join, the presumption is that they received the money. These principles lead to the conclusion that a trustee cannot be held liable for the acts or default of his co-trustee unless he himself participated in or contributed to it. But if he is reckless enough to leave the trust property under the sole control of his co-trustee, he will be liable. The liability arises not from his mere signing of the receipts but from his subsequently leaving in the hands of his co-trustees the money that had been received.[1]

In the case of *executors*, one is not liable for the acts of the other ; he is not bound to join in the receipt for the sake of uniformity. He can alone give a valid discharge ; but if he join, he would be liable for the default committed by his

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[1] Fellows, 11 P. W. 81.

co-executor unless he can prove that he did not receive the particular sum of money.[1] But if the receipt be given under circumstances purporting that the money, though not actually received by both the executors, was under the control of both, such a receipt will make him liable.[2]

In India, too, one trustee is not liable for a breach of trust committed by a co-trustee because of his formally joining with him, i.e., by the mere fact of his signature, if he proves that he has not received the money. He is liable only (*i*) if he has delivered the property to a co-trustee without seeing to its application, or (*ii*) has allowed the co-trustee to deal with the property and retain it with him longer than the circumstances of the case would require, or (*iii*) being aware of the breach of trust by a co-trustee has concealed that fact or has not within a reasonable time taken steps to protect the interest of the beneficiaries. Even in these cases he would not be liable if there is an express provision therefor in the trust instrument.

(*i*) The general rule is that trustees and executors are not chargeable with each other's defaults, but the benefit of this rule is denied to a trustee or executor who has been guilty of negligence.[3]

(*ii*) The law requires from trustees an active and vigilant prudence, and a trustee is called upon, even if a breach of trust is only threatened, to prevent it by obtaining an injunction.[4]

(*iii*) A trustee having accepted the trust and remaining passive and taking no steps to see the trust carried into execution, is liable.[5] Where a trustee stands by for four years while the trust funds are retained by his co-trustees, and though he has abundant reason to put him upon inquiry, makes nothing that can be called an inquiry but

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1 Gascoigne, [1894] 1 Ch. 470.

2 Wesley v. Clprke, 1 Eden 357; Joy v. Campbell, Sch. & Lef. 341 Re Turner, [1897] 1 Ch. 536.

3 Mahomed v. Rodrigues, 7 Bom. L. R. 691.

4 7 Bom. L. R. 695.

5 Bai Jadav, 9 B. H. C. 333.

passively acquiesces in the disappearance of the funds, he is liable to the beneficiary for the default of his co-trustees.[1]

Contribution.—Where a liability is incurred through a breach of trust to which all the trustees were party, then such liability must be met as between the trustees by equal contributions from all the trustees. This is the general rule which may be excluded or modified by the breach having been committed fraudulently or on the advice of one who was an expert on the point on which he advised, or by the fact that one of the trustees was himself a *cestui que trust*.[2]

(*i*) The liability of trustees is joint and several.

(*ii*) The rule applies also to persons who meddle with the property with notice of the trust.[3]

(*iii*) Where two trustees are equally involved in a breach of trust and one of them is a beneficiary; and a judgment against both is satisfied out of the beneficial interest of the one, the beneficiary trustee has no right to contribution against his co-trustee.[4]

(*iv*) No independent action can be brought for contribution for costs of the suit; the court may make the order in the first action.[5]

(*v*) Right to contribution does not arise until the judgment for the breach of trust has been obtained.[6]

S. 27 of the Indian Trusts Act lays down that if the trustees jointly commit a breach, or if one of them by his neglect enables the other to commit it, each of them would be liable to the beneficiary for the whole loss. As between themselves there can be no contribution if one is guilty of fraud; but in other cases a trustee may call upon his coleagues to cotribute to the loss.

1 7 Bom. L. R. 691.

2 Strahan's Leading Cases in Equity, P. 175.

3 Blyth v. Fladgate, (1891) 1 Ch. 337.

4 Chillingworth. 1896 1 Ch. 685.

5 Dearsey, 18 Ch. D. 236.

6 Robinson v. Harkin, 1896 Ch. 415; Butler, 7 Ch. 116.

No liability for involuntary losses.—Section 30 of the Indian Trusts Act is to the effect that trustees shall not be liable for any banker, broker or other person in whose hands any trust property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for involuntary losses.

Prob.—A, trustee of a marriage settlement, allowed the trust funds to be in the hands of his co-trustee B for investment. B entrusted the funds to a broker D, who applied a portion thereof to his own use. Is B liable for the loss, and if so can he claim contributiou from A ?

A.—S. 30 of the Indian Trusts Act protects a trustee in such a case; A and B would not be liable for misapplication of the money by D unless money was left with D longer than was necessary to get it invested; but supposing B is liable for his having allowed money to remain with D unnecessarily; then the question would arise whether A would under s. 26 be liable for the default of his co-trustee B. Again *in* this case, in order to hold A liable, it must be proved that A neglected altogether to see to the application of the money or allowed money to remain uninvested with B for an unusually long period; if so A is equally liable, and then under s. 27 each of them will be liable to the beneficiary for the whole of the loss ; but amongst themselves they will be able to claim contribution, they being equally guilty and none having committed fraud.

CHAPTER X.

When a trustee can purchase trust property.—Rights of a trustee and beneficiary.—Extinction and revocation of trust —Release of a trustee.—Devolution of office.

Disabilities of a trustee.—(1) He cannot at his will renounce after acceptance. A trustee who has accepted the trust can renounce it under section 46 of the Indian Trusts Act only:—

(*a*) With the permission of the principal Civil Court of the district.

(*b*) With the consent of the beneficiary, if he be competent to contract.

(*c*) If there is such special power reserved in the trust instrument.

(2) He cannot *delegate* his office to another.

The confidence reposed in a trustee is of a strictly personal character, and the duties connected with the trust must be performed by him personally. The maxim "*Delegatus non potest delegare*" applies also to a trustee; and he himself being a person to whom the office of confidence is delegated cannot delegate his own nominee to discharge the duties. Under s. 23 of the Trustee Act, 1925, a trustee may employ a solicitor, a banker or a stockbroker to transact any business in the execution of the trust provided he exercises proper discretion in selecting such agent. Whenever in the ordinary course of the trust business it is usual to appoint agents, he may appoint them. He is not responsible for the default of any such agent if employed in good faith. Prior to this Act, there was no statutory power of delegation. In addition to this, a new power is given to the trustee under s. 25, of delegating his trust during his absence abroad for more than one month by power—of attorney.

Appointing persons to do merely ministerial work would not be a delegation, for in that case it is the trustee himself who has to do the main acts involving the exercise of discretion.

Under section 47 of the Indian Trusts Act a trustee is allowed to delegate his authority only:—

(1) If the instrument so provides:—

(2) If the delegation is necessary (there is absolute necessity for it):

(3) If it is in the ordinary way of business; the selection should be made as an ordinary reasonable man would.

(4) If the beneficiary being competent to contract consents to the delegation.

(*i*) He should not leave it to the solicitor to employ a valuer nor leave securities in his hands indefinitely[1]; nor should he leave money in the hands of a broker.[2] A trustee can employ an auctioneer for trust property, or a person to collect rent of the trust estate.

(*ii*) He would be liable if he leaves money unnecessarily to lie with a banker who fails.

(*iii*) Where there are two trustees and one of them already has the custody of the title-deeds the other may safely leave him in the custody thereof.[3]

(*iv*) Even where delegation is allowed, a trustee must use due diligence in selecting the person.

(3) Trustees cannot act singly. Section 48 of the Indian Trusts Act requires all co-trustees to join in the execution of the trust except where it is otherwise provided in the instrument of trust. The English law on the point is summed up in Townley v. Sherborne[4]. If property is vested in co-trustees they all form one collective trustee and have

1 F. v. Field 1899 I Ch. 425.

2 Speight v. Gaunt, 9 Ap C. L.

3 Jones, 1903 I Ch. 262.

4 Townley v. Sherborne, W. & T. L C.; Re Flower. 27 Ch. D. 592.

therefore to execute their duties in a joint capacity ; one should not allow a co-trustee to sign cheques or to retain bonds payable to bearer.

(4) He cannot charge remuneration for services. Section 50 of the Indian Trusts Act disables a trustee from receiving remuneration for his trouble, skill and loss of time in executing the trust, unless:--

(1) The instrument of trust allows it ; or,

(2) Express contract to that effect is entered into with the beneficiary (such contracts are jealously watched) ; or,

(3) It is expressly allowed by the court at the time of the trustee's acceptance of the office—where the execution of the trust is more than ordinarily burdescome.

But then official trustee, public curators, administrator-generals can receive remuneration.

English law.—It is an established rule that a trustee, executor or administrator shall have no allowance for his care and trouble ; the reason seems to be that on these pretences, if allowed, the trust estate might be loaded and rendered of little value,[1] the essence of the office being that it is to be gratuitous. Although trustees will not, in the absence of direction, be allowed remuneration for their own trouble and loss of time, they may employ agents whose expenses will be allowed out of the estate. A trustee cannot profit by his trust directly or indirectly except in special cases.[2]

Generally speaking he must administer the trust gratuitously as voluntary service is the foundation underlying trusteeship in law.[3] A Solicitor trustee can charge his costs only when be acts as a Solicitor in a suit for any of the beneficiaries or when he acts for himself and his co-trustees

1 W. & T. Leading Cases, p. 556.

2 Lawton, 34 Ch. D. 673.

3 Robinson v. Pett, 2 W. and T. 606.

jointly if the costs have not increased by his being one of the parties.[1] He can employ his partner to do any legal work and pay his proper charges in any case in which he could have employed another Solicitor. However such partner will be exclusively entitled to receive it.[2]

There are, however, exceptions to the general rule. A trustee may be given some allowance either by express agreement or by provision in a will or deed. Thus a testator may direct generally compensation to be made to an executor or trustee, for his care and trouble, or he may fix it at a particular sum or salary. So also trustees may at the time of accepting the trust, contract with their *cestui que trust* to receive some compensation or to make professional charges, but such contract, unless perfectly fair and without undue pressure, would not be enforced.

(5) He cannot use trust property for his own purposes. He cannot deal with it for a purpose unconnected with the trust. This follows as a natural sequence of the above disability of the trustee on the principle of *Robinson* v. *Pett*.[3] If a trustee uses the trust property for his own purposes, he is liable to make good the loss and is also a constructive trustee of the profit so made. He cannot trade with trust funds. If he is a trustee of leasehold and if he causes it to be renewed in his name, he would be a constructive trustee of the same.

(6) Co trustees should not lend trust property to one of themselves even on mortgage or personal security.

English law is absolutely prohibitive; they should not lend however good the security may be. This is based on the principle that his interests should not conflict with the discharge of his duties.

(7) He should not purchase trust property for himself either directly or indirectly.

Purchase of trust property by trustee.—Sections

1 Croddock v. Piper 19 L. J. Ch. 107.
2 Clack Vs. Carlon [1861] Jur. (N.S.) 441.
3 See supra.

52 and 53 of the Indian Trusts Act lay down this disability of a trustee thus: A trustee for sale or his agent should not directly or indirectly buy the trust property or any interest therein on his own account or as agent for a third person, nor should a trustee, whose duty it is to purchase or get a mortgage or lease for his *cestui que trust*, do the same for himself. A trustee, if not a trustee for sale, can acquire an estate from the beneficiaries who are *sui juris*, but only if he has made the fullest disclosure to them of all the facts within his knowledge as to the value and condition of the estate and the parties are at arm's length; otherwise the purchase is bad. The basis of the rule is that a person occupying a fiduciary relation may not use for his own benefit information which he has acquired as to the trust estate. Even if a person in a fiduciary position is otherwise entitled to purchase yet, if he effects the purchase secretly in another person's name, such purchase can never be allowed to stand.[1] It was laid down in *Plowright* v. *Lambert*[2] that a trustee for sale cannot sell to himself and that even if he be not a trustee for sale, the burden of proof lies on him to show that every possible advantage has been gained for the trust. A trustee or who has recently seized to be a trustee can, however, buy or be a mortgagee or lessee of the trust property or any part thereof, with the permission of the principal Civil Court of original jurisdiction, and this permission is given only if the proposed transaction is manifestly to the advantage of the beneficiary with all this, if the trustee purchases the property wrongfully, the effect is (under s. 62) this:—The beneficiary may have the property declared subject to the trust or retransferred by him (trustee) if it remains unsold in his hands; if it is bought from him by another with notice of the trust by such person—

(*i*) The beneficiary has to repay the purchase-money paid by the trustee with interest and

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1 Peari Mohan V. Manohar, 23 Bom. L. R. 913 (P. C.) 914, 915.

2 (1885) 52 L. T. 646, 652, 653.

expenses incurred in the preservation of the property.

(*ii*) The trustee or purchaser has in his turn to account for the net profits of the property, to pay occupation rent and compensation for deterioration caused by his act or omission.

Section 62 of the Indian Trusts Act does not, however, affect those that have before the suit contracted in good faith with the trustee or purchaser ; a beneficiary cannot take advantage of s. 62 if he has himself ratified sale to the trustee with full knowledge of the facts.

The disabilitity extends even to a purchase effected collusively through the intervention of third partis.[1] The prohibition is imperative. It is not necessary to show that the trustee made advantage out of the transaction.

English law.—The general rule is that a person in a fiduciary position or in a position of confidence towards another shall not be allowed to take any advantage out of his position. The law relating to purchase by a trustee may be considered under two heads: (1) purchase by a trustee from himself or his co-trustee, (2) purchase by a trustee from his *cestui que trust.* A purchase by a trustee for sale, that is a trustee buying from himself, although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the *cestui que trust* for " a sale by a person to himself is no sale at all. "[2] It is not *ipso facto* void and the *cestui que trust* can have it set aside, without showing unfairness or inadequacy of price, nor will a purchase by the trustee at a public auction be sustained. It will however, be sustained if made with the sanction of the court or under an express power in the instrument.

As regards purchase by a trustee from his *cestui que trust*, he may buy from the *cestui que trust* provided that there is a distinct and clear contract, ascertained to be such

1 Campbell, 9 Ves. 678.

2 W. & T. Leading Cases, p. 681.

after a jealous and scrupulous examination of all the circumstances proving that the *cestui que trust* intended that the trustee should buy and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee.[1] It is only when the trustee has communicated the full information he possesses to the beneficiary and the relationship has been satisfactorily dissolved, that the purchase would be upheld, else it would be liable to be set aside. As is technically said, the parties must be at arm's length. There must be fullest information given and no advantage taken. But a merely nominal trustee, e. g., a trustee who has disclaimed the trust, may become a purhaser.

A trustee can purchase—

(1) If he has given fancy price for it, i.e., more than the market price[2] or,

(2) When the parties are at arm's length, i.e., there is fair dealing, and offer to sell proceeds from the *cestui que trust.*[3]

(3) If the sale is by public auction, and permission of the court is obtained.

(4) If he is a bare trustee (is not an actual trustee but a nominal one) without having any duties to perform, or one who has disclaimed.

Onus of proof.—The burden in these cases is on the trustee to prove that the transaction was fair and that there was full disclosure.[4]

(*i*) Trustee can sell the trust estate to joint stock company of which he may be a shareholder.[5]

(*ii*) The sale will not be set aside if the beneficiary himself urges the purchase upon one of the trustees who purchases after great

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1 W. & T. Leading Cases, p. 685.

2 Ex-parte Lacey, 6 Ves. 626; also see H. v. Hickley, 2 Ch. D. 190

3 Dougan v. McPherson, (1906) A. C. 197.

4 Boswell v. Coaks, 11 A. C. 232.

5 Farrar, 40 Ch. D. 395.

unwillingness.[1]

The leading equity cases mentioned below[2] lay dawn these principles.

Rights of a cestui quo trust (beneficiary)— These are set out in ss. 55 to 61 of the Indian Trusts Act:—

(1) A beneficiary has a right to the rents and profits of the trust propeity and is entitled to have the intention of the author of the trust specifically executed to the extent of his (the beneficiary's) interest. (Ss. 55-56.)

The settlor cannot direct accumulation of income[3]; the right to enjoy rents accrues from the date the deed comes into operation.

(2) A beneficiary may, if competent to contract, require the trustee to transfer the trust property to him or to any person he may direct. (Exception is made in case of a married woman who has it with restraint on anticipation.) (S. 56.)

(*i*) If there are several beneficiaries all can require transfer of possession if they be competent to contract and of one mind.

(*ii*) This is what is known in English law as *cstui que trust's* estate in the special trust.

(*iii*) A martgagee of a beneficiary can exercise this right after foreclosure or sale.[4]

(3) A beneficiary may, if competent to contract, *transfer* his own beneficial interest [but not so a married woman as in (2) during her marriage). (S. 58.)

(4) If no trustees are appointed or all of them die, disclaim or are discharged, a beneficiary may sue for the execution of the trust, and it shall, so far as is possible, be executed by the court until the appointment of another trustee. (S. 59.) The principle is " **Equity never wants**

1 Morse v. Royal, 12 Ves. 355.

2 Keech v. Sandford, W. and T.; Romford Market case; Fox v. Macreth, 2 W. and T. 141.

3 See S. 18, Transfer of Property Act, and s. 117, Indian Succession Act.

4 Cooper, 4 Ch, D. 814.

a **trustee.** " The court of equity will follow the legal estate and decree the person in whom it is vested to execute it. In the absence of anyone the court may assume the office in the first instance. Beneficial interest cannot suffer for want of a trustee

(5) A beneficiary has a right to inspect and take copies of instruments of trust. accounts, etc, (s. 57), vouchers, if any, and opinions taken by a trustee for his guidance in the discharge of his duty. He or his solicitor can inspect; if he wants copies he can have them at his own cost. Documents of title can be inspected only if they refer to the trust property.

(6) A beneficiary has a right to proceed against the trustee for breach of trust (ss. 62, 63).

(7) A beneficiary has a right that the trust property shall be properly managed and protected by proper persons and a proper number. When the trust involves receipt of money the number snould be at least two. A person domiciled abroad, *alien* enemy, a person having an interest inconsistent with that of the beneficiary, a person in insolvent circumstances a married woman and a minor are not proper persons (s. 60).

(8) A beneficiary has a right to compel his trustee to any act of duty or to restrain him by an injunction from committing a breach of trust (s. 61).[1] In England. injunction is given and a receiver appointed where a trustee is insolvent[2] or is about to become bankrupt or is a person of dissolute habits.

(9) In England, upon the total failure of the objects for which the trust was subscribed the majority of beneficiaries, if they agree, can demand the trust money back from the trustee.

Rights of trustee.—(1) A trustee is entitled to the *possession* of the instrument of trust and all documents of

1 Balls v. Strutt, 1 Hare 146.

2 Bank, (1897) 1 Ch. 174.

title relating solel to the trusty property (s. 31).

(2) A trustee is entitled to rimbursement for all proper expenses out of the trust property, e. g., he can charge for reasonable costs incurred atter sub-agents, solicitors, bailiffs, though not for his own remuneration (s. 32). The expenses will include those incurred in realization, preservation or benefit of the trust property or the protection and support of the beneficiary.

(3) If he pays out of his own pocket, he has a *lien* or charge on the estate as security for this. The disposition of the trust property would be prohibited till this is paid up. If the trust property fails, the beneficiaries personally must pay up (s. 32). A trustee is entitled to be recouped for erroneous over-payment—first out of the beneficiary's interest in the trust property, and if that fails, from the beneficiary personally.

(4) He has a right to indemnity from the gainer by a breach of trust, except when he himself is guilty of fraud.

(5) He can get the opinion or direction of the court in the management of the property (s. 34). He can do it without instituting a suit by a petition to the District Court or to the High Court as the case may be. Questions of detail or difficulty which are not proper for summary disposal cannot be so determined. A copy of the petition must be served upon the persons interested. The trustee acting under this section is free from responsibility for his acts. Costs of the application are in the discretion of the court.[1] The object is to procure for the trustee at a small expense the assistance of the court upon points of minor importance arising in the management of the trust. An executor cannot claim the advantages provided for trustees by s. 34 of the Act. His remedy if he feels any doubt as to the manner in which he should administer the estate come to his hands is to file an administration suit.

1 Madras Doveton Fund, 18 Mad. 443.

(6) He has the power to sell trust property if so empowered in lots, by auction, or on any special conditions and can then convey (ss. 37, 38, 39). He is to act in a way most advantageous to the trust estate.[1] He must use due diligence in inviting competition.[2] He has to inform himself of the real value of the property by employing a valuer if necessary. He can also buy in and resell. He has to exercise reasonable diligence as to the time for effecting the sale. He should not postpone the sale indefinitely.[3]

In cases of real emergency not provided for by the trust instrument and not within the reasonable contemplation of the author of the trust, the court has power under its extraordinary jurisdiction to sanction the trustees doing acts which are necessary for the protection of the trust estate although not expressly authorized by the trust instrument. But this jurisdiction is of an extremely delicate character and must be exercised with the greatest caution.[4] In England under s. 57 of the Trustee Act, 1925, the court may sanction any sale, lease, mortgage or other transaction not provided in the instrument of trust, where, in its opinion, it is expedient for the management or administration of trust property.[5]

(7) He can at his discretion vary the investments (s. 40). In some cases he has to take the consent in writing where there is a person entitled to the income of the trust property for his life before varying an investment. The authority exists, though not given in the deed.

(8) He has on completion of his duties a right to demand a settlement of account and to an acknowledgment or release if nothing is due to the beneficiary (s. 35). The acknowledgment must be in writing. Though nothing is said in the section it is clear that a settled account can be

1 Down, 3 Mer. 208.

2 Pechel, 2 Amst. 350.

3 Feavy, 27 Beav. 144.

4 In re Shirinbai Merwanji Dalal, 21 Bom. L. R. 41; In re Manilal Hargovan, 25 Bom. 353; De Souza v. Daphtary, 25 Bom. L. R. 617.

5 In re New, (1901) 2 Ch. 534.

reopened and there is liberty to surcharge and falsify, i. e., give credit for an item omitted and take off the item wrongly debited. He cannot, however, demand a release. He can have an acknowledgment only that nothing is due on accounts.

(9) He can apply the property of the minor for his education and maintenance, or for expenses of his religious worship, marriage, etc. (s. 41). The trustee can either apply the sum himself for the support of the minor or pay to his guardian. He can pay out of the income only and not out of *corpus*, except when the income is not sufficient and the permission of the court is obtained. This section does not affect any provisions in the Guardian and Wards Act. The balance of the income is to be allowed to accumulate.

(10) He has power to give receipts and compound in certain cases (ss. 42-43).

The general authority of a trustee.—The above are the rights of a trustee; they are his special powers as such; but he has certain general authority and that is defined in s. 36 of the Indian Trusts Act. He can do all acts which are reasonable and proper for the realization, protection or benefit of trust property and for the protection and support of the beneficiary who is not competent to contract. He cannot lease trust property for more than 21 years without the permission of the court.

Extinction of trust.—A trust is extinguished (s. 77)—

(1) when its purpose is completely fulfilled;
(2) when its purpose becomes unlawful;
(3) when the fulfilment of its purpose becomes impossible by destruction of the trust property or otherwise;
(4) when the trust being revocable, is expressly revoked.

Revocation of trust (s. 78)—

(1) If a trust is created by will it can be revoked at the pleasure of the author of the trust;
(2) If created otherwise:—
   (*i*) When all the beneficiaries are competent to contract it can be revoked by their consent.

(*ii*) When it is declared by a non-testamentary instrument, or orally, it can be revoked in exercise of the power expressly reserved to the author of the trust.

(*iii*) When it is for the payment of the debts of the author thereof and has not been communicated to the creditors, it can be revoked at the pleasure of the author thereof.

If it is communicated, it can be revoked only with their consent. The right is strictly personal to the settlor. His representatives cannot revoke.[1]

It cannot be revoked so as to prejudice or defeat what the trustees have duly done in the execution of the trust; revocation cannot be retrospective.[2]

Release of a trustee.—A trustee is released (i. e., his office is vacated)—

(1) by death (*ipso facto*); office is not hereditary.

(2) by *discharge* from office, which is—

(*i*) by the extinction of the trust;

(*ii*) by the completion of his duties under the trust;

(*iii*) by the means prescribed in the trust instrument;

(*iv*) by appointment of a new trustee under this Act;

(*v*) by consent of beneficiaries (if competent to contract),

(*vi*) by the court to which the petition is presented.

A trustee has an inherent right to apply for discharge, and s. 11 of this Act is no bar to his doing it. The application has to be made to the District Court or to the High Court as the case may be. The Court can discharge him at once if there is sufficient reason for so doing; else it will refuse to discharge him unless there is a proper person to take his place; but he is not in every case bound to show to the court that there is a proper person available to take his place. (S. 72.)

1 Fitzgerald v. White, 37 Ch. D. 18

2 Wilding, 1 Coll. 655.

In England when a trustee is desirous of being discharged from the trust, he may retire under s. 39 of the Trustee Act, 1925, provided his co-trustees consent to the discharge of the trustee, and provided after his discharge, there will be either a trust corporation or at least two individuals to act as trustees to perform the trust.

Appointment of new trustees.—On the death or discharge of one of several trustees, the trust property passes on to others unless the trust instrument prescribes the contrary. Under s. 73, when a person appointed as trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from British India or leaves it for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes in the opinion of the principal Civil Court of original jurisdiction unfit, or personally incapable to act, or accepts an inconsistent trust, a new trustee may be appointed in his place by :—

(*a*) the nominee (in the instrument) for the purpose;

(*b*) the author of the trust, if alive and competent to contract ;

(*c*) the surviving or continuing trustees or the legal representative of such last trustee;

(*d*) the retiring trustee (with the consent of the court).

Increase in number of trustees.—On an appointment of a new trustee, the court can increase the number of the trustees—unless expressly forbidden by the instrument.

Appointment by Court.—The court interferes in case of vacancy or disqualification; but only when it is found imparacticable to appoint new trustees under s. 73.

In England. the court has, under s. 41 of the Trustee Act, 1925, the power of oppinting a new trustee or trustees whenever it is expedient to do so and it is found inexpedient,

difficult or impracticable so to do without the assistance of the court. The court has also the power to make an order appointing a new trustee in substitution for a trustee who is convicted of felony or is a lunatic or a bankrupt or is a corporation which is in liqudation or is dissolved. When the court appoints a corporation other than the Public Trustee to be a trustee, the court may authorize the corporation to charge such remuneration as the court may think fit. Every trustee appointed by a court of competent jurisdiction shall have the same powers, authorities, and discretion and may in all respects act as if he had been originally appointed a trustee. *S.* 34 of the Trustee Act, 1925, limits the number of trustees to four. Where there are four trustees of a settlement of land, no new trustee shall be appointed until the number is reduced to less than four and the number shall not be increased beyond four. The section, however, only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply in the case of land vested in trustees for charitable or public purposes.

CHAPTER XI.

EQUITABLE ESTATES, INTERESTS AND ASSIGNMENTS.

(1) *Nature of Equitable Estates.*

Equitable estates in land have their origin in the ancient practice of persons putting their trusted friends in possession of their lands, in confidence that their friends would dispose of them according to the wishes of those persons. *Strahan* in his "Digest of Equity" explains in a nutshell how an equitable estate arises :—

"An equitable right arises when a right vested in one person by the law should, in the view of equity, be, as a matter of conscience, vested in another. Where this state of affairs exists, equity does not attempt to transfer the legal right to the person in conscience entitled to it, but directs the person entitled to the legal right to use it for the benefit of the person entitled in conscience to it."

The common law of England took no cognizance of fiduciary relations. 'Trust' as we now understand it was unknown to the common law. It was to protect such transactions made in confidence that the Court of Chancery, or the Court of Conscience interfered with the rights which an owner of property had at common law. Equity claiming to act on the conscience of the legal owner of property would not allow him to soil his conscience by doing wrong to another. The result of this claim of the Court of Chancery, viz., "Equity acts on the conscience of a party," was that equitable estates and interests in real property and personal property came into existence.

Equitable estates in real property arise either under a trust or a mortgage. An equitable estate under a trust arises

when by virtue of a deed, will or other instrument the legal owner is bound to hold the property for the benefit of another or when the circumstances are such that a court of equity will impose this obligation upon the legal owner. If A created a trust of Blackacre in favour of B and appointed C a trustee with instructions to execute the trust, the court of equity recognized the interest taken by B, the *cestui que trust*, and saw that the trustee, the legal owner, acted in good conscience.

Originally, the right of the beneficiary was recognized as merely personal. He had no proprietary right or right *in rem*. He could only enforce it against the trustee or subsequent purchasers of the estate with notice of the trust. Later on, this personal right came to be regarded as giving him an estate in the land itself. Thus, in the above illustration B has not merely a right against C, but he can proceed against all persons who subsequent to the trust happen to acquire any interest in the property. This is, of course, subject to the rule that the rights of a *bona fide* purchaser for value without notice of the trust cannot be defeated.

An equitable estate arises under a legal mortgage when the day fixed for redemption of the debt has passed without payment of the mortgage-money. At law, the mortgagor forfeited his right on failure to pay the amount due on the due date, but, in equity, he is relieved, and the interest that he retains is called an equity of redemption.

The recognition of equitable estates and interests raised the necessity of dealing with them. These estates, though purely creatures of equity, were dealt with upon the maxim "Equity follows the law," and, therefore, the rules applicable to legal estates were made applicable to equitable estates, e. g., *words of limitation* usually received the same construction as in the case of legal estates. The rule of primogeniture was not interfered with. The same rules of descent as at common law were followed. Equitable estates can be devised and

alienated in the same way and can be made available for payment of money.

Though the maxim "Equity follows the law" had a general application in dealing with equitable estates, in some cases it was not absolutely followed. In cases where the deed shows a clear intention that the estate is to pass in a particular way, the technical rules as to words of limitation are not to be applied. The maxim is also not applied in the case of rights such as escheats and dower which are allowed in favour of third parties as being incidents to a legal estate.

Section I of the Law of Property Act, 1925, has reduced the number of possible legal estates to only two. Thus the estates in land capable of subsisting or of being conveyed or created at law are:—

(1) Estates in fee simple absolute in possession and

(2) A term of years absolute.

All the other estates and interests existing at law before 1926 take effect as equitable interests.

Incidents common to legal and equitable estates.—The maxim of equity being that equity follows the law, the incidents which attach to an equitable estate are generally the same as those which attach to a legal estate; such, as has already been noted before, are the construction of words of limitation, of estates and rules of descent; such also among others are rules as to merger courtsy and liability. to execution for debts.

Points of differnce between legal and equitable estates.

Legal estates.	Equitable estates.
(1) Any person who gets the legal estate in a property for valuable consideration and without notice of any equitable interest attaching to the same, gets the legal estate without being affected by the rights of the person having the equitable interest therein :—	

Legal estates.	Equitable estates.
Where there is equal equity the law shall prevail.	(2) Equitable interests are not subject of .tenure: e. g., incidents such as dower and escheat which are incidents to a legal estate are not incidents to an equitable estate.
	(3) Another difference arises from the equitable doctrine of " conversion " whereby realty is considered as personalty and personalty as realty before the actual conversion of the equitable interest takes place.
	(4) The rights of married women to hold property were very limited under the common law. Equity allowed married women to hold equitable interests.
	[5] Legal interests in personalty cannot be divided up to be enjoyed in succession by different owners. Equitable interests in personalty may be held in successive estates.

Equitable assignments.—The next question that arises is the mode of dealing with these equitable estates and interests.

A " *Chose in action* " means a thing recoverable by action. A " *Chose in possession* " means a thing of which a person has actual possession. Choses in action, therefore, are all personal rights which can be claimed or enforced by action and not by taking possession,

Choses in action are classified into (*i*) legal choses and (ii) equitable choses in action.

Legal choses in action are those which can be recovered or enforced by action at law, e. g., a debt, or a bill of exchange.

Equitable choses in action are those which are enforceable in the Courts of Chancery, e. g., an interest in trust funds or a legacy.

" The great wisdom and policy of the sages and founders of our law, " says *Coke*, " have provided that *no possibility, right, title, nor thing in action, shall be granted or assigned to strangers*, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people and the subversion of the due and equal execution of justice."[1] The common law prevented the assignment of (1) contractual rights and possilities. The only exception was in favour of the king who could either grant or receive a possibility or chose in action by assignment. and by the Law Merchant, bills of exchange were negotiable.

It was a well-established principle of common law that choses in action, such as a debt, could not be assigned without the concurrence of the debtor. The practical difficulty confronting the assignee in the case of such an assignment of a debt or other thing in action was that he could not sue at law in his own name without making the assignor a party to his action. The courts of equity, however permitted legal choses in action to be assigned. And there was no difficulty where an equitable assignment was made of property recoverable in courts of equity, i. e., equitable choses in action, such as the beneficial interest in personalty under a will or intestacy, for the assignee could sue in his own name in equity for such purpose.

With the growth of commerce, the old rule was modified by custom and certain statutes whereby legal choses in action could be assigned at law. Thus bills of exchange, promissory notes and other negotiable instruments could be assigned by the Law Merchant. The Policies of Assurance Act, and the Marine Insurance Act made policies of life and marine insurances assignable. Finally, the Judicature

1 White and Tudor's Leading Cases, P. 97.

Act of 1873 made all debts and legal choses in action assignable at law.

As regards contingent rights or title or things in action, e. g., a mere expectancy of an heir of succeeding to the estate, they were not assignable at law, for a man could not assign what he had not got. " They were assignable in equity provided they were made for valuable consideration. "

It may be noted that rights under agreements of a personal nature are not assignable either at law or in equity, e. g., agreements between authors and publishers, master and servant partners, etc.

A chose in action must also be distinguished from a mere right to sue for damages for breach of contract or for a tort; a mere right to sue is unassignable, but an assignment of the right to the damages which may be recoverd in an action whether founded on contract or tort may be made.[1]

Requisites of a vaild legal assignment.

S. 136 of the Law of Property Act, 1925, now enacts that *a legal assignment* can be made of a legal chose in action and the assignee can recover it provided certain requisites are fulfilled.

(1) It must be *absolute* and not *purporting to be* by way of charge only.

(2) It must be *in writing* under the hand of the assignor.

(3) The subject-matter of the assignment must be a debt or other legal chose in action. The assignment of a part of a debt is not within the section.

(4) *Express notice in writing* must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or thing in action. Notice by either the assignor or assignee is valid and notice may be given after the death of the assignor.[2]

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1 Glegg v. Blomely, (1912) 3 K. B. 474.

2 Beteman v. Hunt, (1904) 2 K. B. 530, 538.

Where the above requisites are fulfilled, there is a complete valid assignment at law, No particluar form of assignment is necessary. A direction to pay the assignee is sufficient. The object of giving notice to the debtor is to protect the interest of the assignee. If the requisite notice is not given, the assignee will not recover from the debtor in case he pays the original creditor. It may also be observed that the assignee takes subject to the equities at the date of assignment.

The assignment has the effect of transferring the legal right to the chose in action to the assignee as from the date of the notice with power to give a good discharge for the same without the concurrence of the assignor.[1]

Assignments in equity.—A legal chose in action can also be assigned in equity. There is no hard and fast rule as to the form of a valid equitable assignment. " It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril.[2] The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear since equity always looks to the intent rather than the form.

An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor or an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, will create a binding equitable assignment and the consent of the party to whom the order is given is not necessary.

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1 S. 136, Law of Property Act, 1925.

2 Per Lord Macraghten in Brandts v. Dunlop & Co., (1905) A. C., p. 462.

The intention to assign or to create a charge must, of course, be clearly shown. A mere letter of instruction to a banker without any intent to create a charge on a fund in his hands will not amount to an equitable assignment. "You can have no charge in equity without an intention to charge.[1]"

Illustrations.—(1) A, the assignor, directs B, who holds funds of the assignor, to pay C, the assignee, and charge to his account. This is a valid equitable assignment.[2]

(2) B is indebted to A for a sum of £100. An agreement between B and A whereby B agrees to pay any amount out of that fund to a third person would be enough to constitute an assignment in equity. The debt must be paid out of a specific fund.

A mere *mandate* from a principal to his agent not communicated to a third person, will give the third person no right or interest in the subject of the mandate.

An equitable chose in action can be assigned only in equity.

An assignment of an equitable chose in action e. g., a legacy, though voluntary, will be enforced, provided that the donor has done everything required to be done by him in order to transfer the debt or fund.

Notice of assignment.—It is not necessary to give notice to the person owing the debt to complete the title of the assignee, because it is merely meant for the protection of the assignee and he may give it or get it given if he choose to perfect his title to the subject-matter of the assignment as against third persons so as to get priority against a subsequent assignee. But it is always desirable for the assignee to give notice of the assignment to the debtor to prevent him from paying the assignor and to preserve his priority against subsequent assigees. The doctrine governing this rule in England is known as **the rule in Dearle v. Hall.** The principle may be briefly summed up this:—Notice is not

1 Hopkinson v. Forster, 19 Eq, 74.

2 Webb v. Smith, 30 Ch. D. (1885) C. A.

necessary to perfect the assignment between the assignor and assignee, though it is necesary to preserve priority against a subsequent assignee. For security's sake the assignee must give notice to the holder (one who has legal dominion over) of the fund assigned in order to obtain a right *in rem*; obviously third parties would not be bound unless a notice of the transfer is served upon them. In such a case the assignee would merely have a right *in personam* as against the assignor only. If the fund is in court a stay order must be obtained and it is equivalent to notice; in all other cases notice must be given to the person having legal dominion over the fund in question. Priority always rests on priority of notice; in case of co-trustees, notice to one trustee is in general sufficient to prevent a subsequent assignee from obtaining priority; if that one trustee to whom notice is given, die without communicating it to other co-trustees, the said other co-trustees are not liable for what they do or did in ignorance of the notice to all co-trustees. Hence it is always safe to give notice to all co-trustees and particularly to those who are in charge of the fund, i.e., those who have to pay over the fund to the assignor. Even a trustee in bankruptcy must give notice to preserve his priority. As regards the time of giving notice, it is held in England that it must be given after the fund comes under the control of that person and before it is paid over by him.

How notice should be given.—It was not necesssary, prior to the Law of Property Act, 1925, that a notice to a trustee or holder of the fund should be in writing; a verbal informal notice was sufficient provided the fact of assignment was distinctly and clearly brought to the mind of the trustee or the holder of the fund. But s. 137, sub-section 3 of the Law of Property Act, 1925, now provides that "A notice otherwise than in writing, given to, or received by, a trustee after the commencement of this Act as respects any dealing with an equitable interest in real or personal property, shall not affect the priority of competing claims of purchasers in

that equitable interest." Notice may be given either by the assignee himself or his agent. It is sufficient if the trustee or the holder of the fund receives *aliunde* such notice as a reasonable man in the ordinary course of business would act upon.

This rule of notice is not applicable in *England* to shares in registered company, etc.; and similarly in *India* s. 137 of the Transfer of Property Act saves stocks, shares, debentures or instruments which are for the time being, by law or custom, negotiable, or any mercantile document of title, from the operation of the rule of ss. 130-136 of that Act.

Rights and remedies of assignee under an equitable assignment.—Where the assignment was of an *equitable chose in action*, the assignee could sue for it in his own name in the Court of Chancery. Where the assignment was of a *legal chose in action*, the courts of law allowed the assignee to sue in the name of the assignor. But now the assignee can sue in all the divisions of the High Court in his own name without making the assignor a party to the action.

The assignment is "subject to all equities."—The assignee, whether of a chose in action or a trust fund, can acquire no greater rights under the assignment than those enforceable by the assignor and he therefore takes subject to all defences existing in respect of the right assigned which would be available against the assignor seeking to enforce the rights assigned. This is tersely expressed by the statement that the assignee takes subject to all equities. The debtor has, as against the assignee the same equities and the same rights of set-off and other defences as he would have had as against the assignor at the date at which notice of the assignment is given to him. But after notice the debtor cannot do anything to diminish the rights of the assignee.

This rule that the assignee takes subject to all equities

must yield where a contrary intention appears from the nature or in terms of the contract.

Choses in action not capable of assignment.—There are certain choses in action which are not capable of assignment on the grounds of public policy. Thus the following assignments are not recognized :—

(*a*) Assignment affected by champerty, maintenance or other corrupt considerations.

(*b*) An assignment of a mere right to sue (except by a trustee in bankruptcy or by the liquidator of a company).

(*c*) Assignments of pensions and salaries of public officers.

(*d*) Personal contracts and covenants.

(*e*) Assignment of alimony. (*Snell.*)

Indian law.—In India we have *actionable claims* which are similar to choses in action. The Transfer of Property Act defines an actionable claim to mean " a claim to any debt other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent. "[1]

Assignment of an actionable claim.—S. 130 of the Transfer of Property Act requires that the transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be complete and effectual only upon the execution of such instrument

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1 S. 3, Transfer of Property Act.

and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether the notice of the transfer be given or not; provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as provided) be vaild as against such transfer; and upon the execution of such an instrument the transferee may sue or institute proceedings for the same in his own name without obtaining the consent of the transferor, and even without making him a party thereto.

The mere execution of the document is sufficient and notice is not absolutely necessary; the transferee, however, if prudent must at once given notice to the debtor, for, if A owed money to B who transferred the debt to C and then B demanded the debt from A who not being served with a notice of the transfer, paid over to B, the payment made by A would be vaild and A could not again be made to pay to C.

S. 131 of the Transfer of Property Act provides that a notice of a transfer of an actionable claim must be in writing, signed by the transferor or his agent duly authorized in this behalf, and if the transferor refuses to sign, by the transferee or his agent, and the writing must state the name and address of the transferee.

S. 6 of the Transfer of Property Act mentions cases where no vaild assignment can be made.

CHAPTER XII.

ELECTION.

Election.—Election may be defined as the equitable accommodation of two inconsistent or contradictory bequests or benefits, one of which the donor has, strictly speaking, no power to bestow without the consent or co-operation of the donee of the other.

Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election presupposes a plurality of gifts, with an intention express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who has to take has a choice, but he cannot enjoy the benefits of both.[1] The doctrine of election is not a positive rule of law; it is merely a right in one party to call upon another to choose between two or more benefits. Until a party is called upon actually to make this choice, there is nothing inequitable in allowing him to enjoy both benefits.[2] Election may be (1) express or positive, and (2) implied or constructive.

Illustration—

(1) A testator by his will gives an absolute legacy of Rs. 10,000 to B; or an annuity of Rs. 600 during his life, at his election. Here it is clear that the intention of the testator cannot be that B should have both the absolute legacy as well as the annuity. B would, therefore, be com-

1 Story's Equity, P. 450,

2 Hanbury's Modern Equity, P. 513.

pelled to elect whether he would take the one or the other. This is a case of *express* or *positive election.*

(2) A testator devises a house worth Rs. 5,000 belonging to B to C and by the same will gives Rs. 6,000 to B. In such a case B has either to take under or in opposition to the will. If he elects to take under the will, he must relinquish the house in favour of C, and take Rs. 6,000 under the will. If, on the other hand, he elects against the instrument, he will take the legacy subject to compensation being awarded to the disappointed legatee, i. e., he will give Rs. 5,000 to C and take the balance of Rs. 1,000. This is a case of *implied* or *constructive election.* S. 35 of the Transfer of Property Act and s. 180 of the Indian Succession Act, 1925, illustrate the case of implied or constructive election.

The foundation of the doctrine of election is the intention of the testator. Its characteristic is that by an equitable arrangement, full effect is given to a donation of that which is not the property of the donor. There is an obligation on the person who takes a benefit under a will or other instrument to give full effect to that instrument. Thus the doctrine of election rests upon the principle that the person taking the benefit must also bear the burden. He cannot approbate and reprobate. It is based on a rule of justice that a party shall not at the same time affirm and disaffirm the same transaction—affirm it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice.[1]

The rules governing election are laid down, in India, in in s. 35 of the Transfer of Property Act and ss. 180 to 190 of the Indian Succession Act. A case for election arises where a person professes to transfer property, which he has no right to transfer and as part of the same transaction confer any benefit on the owner of the property ; such owner must elect either to confirm such transfer or to dissent from it, and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor

1 Rangama v. Atchama, 4 M. I. A. 193.

or his representative as if it had not been disposed of (subject in the following cases to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him):

(1) Where the transfer is gratuitous and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer.

(2) And in all cases where the transfer is for consideration.

The above rule applies whether the transferor does or does not believe that which he professes to transfer to be his own. A person who in one capacity takes a benefit under the transaction may, in another capacity, dissent from it; but a person who does not take any benefit directly under the transaction need not elect though he may derive a benefit indirectly.

All this is, however, subject to this, that if a benefit is expressed to be conferred on the owner of a property in lieu of that property and such owner claim the property, he shall relinquish that particular benefit only and not any other benefit conferred upon him by the same transaction. Acceptance of the benefit by the person on whom it is conferred amounts to an election by him to confirm the transfer, provided the owner is aware of his duty to elect and of the circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances; and the enjoyment of the benefit by that person for two years without doing any act expressing dissent is sufficient to create a presumption of such knowledge or waiver; it may also be inferred from any act of that person which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done. Election will be forced upon such an owner if he does not, within one year from the date of such transfer, signify to the transferor or his representatives his intention to confirm or to dissent from the transfer; and his failure to comply with the requisition within due time

after its receipt shall be construed as an election on his part to confirm the transfer; in case of disability it is allowed to be postponed till the disability ceases or till the election is made by some competent authority.

The purpose of this doctrine is merely to carry out the intention expressed by the grantor in the instrument of grant; a man cannot both enjoy the benefit and repudiate the liabilities under a grant; if he agrees to receive the benefit he must accept the reciprocal obligation also; it is the choosing between two rights when there is a clear intention that both shall not be enjoyed; see **Codrington v. Codrington, (1875) L. R. 7 H. L.** [This doctrine was originally applied in the case of wills,[1] but later on it was extended to conveyances and deeds. It is, however, open to the grantor to exclude the operation of this doctrine by the use of apt words or by showing contrary intention, e. g., a gift to a married woman with a restraint on anticipation. It must be noted that it is only when one claim is made in virtue of an instrument and another adverse to the transaction that a case for election can arise; it cannot arise between several dispositions in the same instrument; thus, beneficiaries need not elect between one clause and another in the same instrument.[2]]

In England, cases of election arose sometimes under special powers and sometimes from the attempts of a testator to dispose of his property by an ineffectual instrument, e g.; in case of infancy, coverture, scotch property, etc., but these cases now do not arise after the Wills Act, Married Woman's Property Act, Preston Act, etc.

In order to raise a case of election, the following conditions are necessary:—

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1 Mangaldas v. Ranchoddas, 14 Bom. 438; Tribhovandas v. T. Smith, I L. R. 20 Bom. 318.

2 Wallinger v. Wallinger, L. R. 9 Eq. 301.

(1) The intention of thé testator or donor to dispose of the property which is not his own should be clear.

(2) The testator or donor must give his own property to the person whose property he has attempted to dispose of by his will oı deed.

(3) The property given by the testator or donor must be capable of being used for compensating the disappointed legatee or donee in case the election is made against the instrument.

(4) The property which the testator or donor has *attempted to dispose of, must be a alienable.*

Illustration.—A bequeaths a house worth Rs. 5,000 belonging to B to C and by the same will gives Rs. 6,000 to B. In such a case B has either to take under or in oppostion to the will. If he elects to take under the will, he must relinquish the house in favour of C and take Rs. 6,000 under the will. If, on the other hand, he elects against the instrument, he will take the legacy subject to compensation being awarded to the disappointed legatee. i. e., he will give Rs. 5,000 to C, and take the balance of Rs. 1,000.[1]

Difference between Indian and English law.—There is a distinction between the English and Indian law as to the disposal of the balance left after satisfying the disappointed legatee. Under the English law the balance goes to the refractory legatee, as shown in the illustration above, but under the Indian Law, it will go to the testator's estate (s. 181, and *ill.* (1) to s. 182. I. S. Act). Under the English law, the donee by electing against the instrument does not incur a *forfeiture* of the whole benefit conferred on him, but he is bound to make compensation out of it to the disappointed transferee and after making compensation take the balance himself. In short *compensation* and not *forfeiture* is the principle on which the doctrine of election proceeds.

1 Streatfield v. Streatfield, W. & T. Leading Cases.

Under the Indian law, *forfeiture* and not *compensation* is the rule.

The rules laid down as to the manner and conditions of election are much the same as in England. except that there is no fixed period there for election as in India.

The word " election " is used in quite a different sense in treating of reconversion, i. e., it is the right to elect to take, in lieu of the proceeds or fruits of any given property, the property itself; while here it means the obligation to elect between two species of property or benefit.[1]

The doctrine of election applies to Hindus[2] as well as Mahomedans.[3] A Hindu widow died making a will in respect of property which she had inherited from her husband. She bequeathed Rs. 2,000 as a legacy to the plaintiff and the immovable property to K, the defendant's father. The plaintiff and K were the heirs of her husband. The plaintiff claimed the legacy under the will and half the immovable property as heir. It was held that the plaintiff should be put to his election whether to take the legacy or half the immovable property.[4]

The doctrine of election applies to every species of property, whether movable or immovable.[5] It also applies to vested as well as contingent[6] rights Thus where A bequeaths an estate to B, in case B's elder brother (who is married and has children) shall leave no issue living at his death and also bequeaths to C, a jewel belonging to B, B will have to elect to give up the jewel or to lose the estate.

Prob.—L by a deed conveyed his Thana estate to a trustee on trust for his daughter M. He then died having by his will demised his Thana estate to his son N and his Poona

1 Haynes, Eq. 367.
2 Mangaldas v. Ranchhoddas, (1890) 14 Bom. 438.
3 Sidik Husain v, Hashim A. 38 All, 627, 43 I. A. 212.
4 14 Bom. 438.
5 Cooper v. Cooper, L. R. 6 Ch. 15, 21.
6 Illustraiions (ii) and (iii) to s. 182, I. S. Act, 1925.

estate to his daughter M. M wishes to have both and comes to you for advice.

A.—No ; she cannot claim both ; s. 35 of the T. P. Act applies ; M will have to submit to an election—either to have the Thana or the Poona estate. If she wishes to have the Thana estate she must elect to forgo the legacy ; if she elects to take the legacy of the Poona estate, she must forgo her rights under the deed to the Thana estate. If the son N is not allowed to have the Thana estate, he is to be allowed compensation to the extent of the value of that estate out of the Poona estate. The English case of *Broadie* v. *Barry*, 2 V. & B. 125, establishes the principle that where there is a clear intention of the donor that the donee should not enjoy both the benefits conferred upon him, equity will compel the donee to elect between two inconsistent or alternative rights or claims ; of course election, though implied, must be made by the donee with a full knowledge of his rights and of the existence of his rights to election.[1]

CHAPTER XIII.

CONVERSION AND RECONVERSION.

Conversion—The equitable doctrine of conversion is the outcome of the fact that there were in England two different systems of intestate succession, the one for realty and the other for personality, prior to the Law of Property Act, 1925. The doctrine has also its root in the simple principle that where property has been given to a trustee, the trustee should not alter the devolution by committing a breach of trust. Thus, for example, a testator devises land to a trustee upon trust for sale, with a direction to hold the sale proceeds in trust for his son. The trustee neglects to sell the land in breach of trust. The son dies intestate. The

1 Cooper v. Cooper, 44 L. J. C.; Streatfield v. Streatfield, 2 Ch. 6 ; Noys v. Mordaunt, 2 L. W. & T. Leading Cases.

question would arise as to who should succeed–the son's heir or his next of kin. The next of kin would be entitled, for if the trustee had sold the land, there would have been no land, but only a fund of personalty, and the claim of the heir that the son was entitled to the land would not be upheld. Similarly, in the converse case if monies are given to a trustee upon trust to purchase land and settle it to the use of the son, in the event of the trustee omitting to buy land, and the son dying intestate, the heir-at-law will be entitled to the monies. It is now an established principle that where money is directed or agreed to be turned into land or land agreed or directed to be turned into money equity will treat that which is agreed tobe done or which ought to be done as done already and impress upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to he converted.[1] Money by deed or will directed to be laid out in the purchase of land, and land directed to be turned into money, are respectively deemed in equity as being already converted by force of the direction simply, and before they are converted in fact. It depends upon the intention of the settlor if it is expressed. A court of equity considers it as an implied trust according to the maxim be "**Equity considers that as done which ought to done.**" It is sufficient if the intention is expressed and it is not necessary that the conversion should have been actually made by the author of the trust.

Thus realty may in equity become personalty or personalty may in equity become realty in the following cases:—

(1) Where a trust instrument imperatively directs trust realty to be sold or trust personalty to be invested in the purchase of land. Such a direction may be contained in a will or deed.

(2) Where a binding contract is made for the sale of land.

(3) Where the order of the court is rightfully made for the sale of land, e. g., A, B, C are equally interested in real property. If the court orders

1 A. G. V. Hubbuck, (1884) 13 Q. B. D. 275.

the sale of that property then as from the date of the order of sale, the property is to be considered as personal property.

(4) When land is made subject to a partnership agreement, e. g., A, B, C, D are partners, X is the son of A. The partnership owns real property. In such a case, as between A, B, C, D or X, B, C, D (if A is dead), the real property is to be treated as personal property.

The direction to convert must be imperative.—If the direction to convert is clear and imperative, express or implied, it is sufficient to produce conversion in equity. It must amount in fact to a trust to convert. Mere power to convert is not imperative.[1] If the direction is void there is no conversion.[2]

Time when conversion takes effect.—The conversion takes place from the date of the (1) death of the testator in case of wills.[3] and from the (2) date of execution in case of other instruments. It may also depend upon future option to purchase, vested in a third person, and the question arises whether the option was created previously to or subsequently to the will. But this is subject to the general rule that the terms of each instrument guide the proper construction thereof. Delay in actual conversion does not affect the respective beneficial interests. There is no such notional conversion where conversion is not the object, i. e., there is no intention to convert [4]

Effect of conversion.—The effect of conversien is to make real estate personal or personal estate real without any actual conversion by the settlor. Money directed to be turned into land descends to the heir, and the land directed

1 Pitman. (1892) I Ch. 279.
2 Walker, (1903) 1 Ch. 565.
3 Beauclerk, 2 Atk 107.
4 Wright v. Rose, 2 Sim. & St. 323.

to be converted into money goes to the personal representative.

Total or partial failure of purposes.—The purposes for which a conversion is directed may fail wholly or partially. It is settled law that where the purposes of the conversion have totally failed, then, as no actual conversion can be necessary to carry out such purposes, the direction is a nullity and the representative entitled to take the property would take as if there was no direction to convert, i. e., where the purposes wholly fail, land directed to be sold results back as land and money directed to be invested in land results back as money. It remains as it was or is at home.[2] A, a testator, devises land to trustees upon trust to sell and pay the proceeds to B. B dies in the lifetime of A. Here the sale is not required for any purpose, and the land will revert to the testator's heir. B, having died, there is no need to convert. If there is a partial failure, various questions arise, viz., (*a*) how far the trust for conversion is in force; (*b*) who is to benefit by the failure; (*c*) in what character the benefit will devolve; and in each case it depends upon the nature of the instrument by which conversion is directed, e. g., a deed or will. Where the purposes have only partially failed then an actual conversion is necessary to carry out such purposes as have not failed, and the representatives entitled to take would take the property in the form in which it is directed to be converted, i. e., where the purposes only partially fail, land directed to be sold results back as money and money directed to be invested results back as land, no matter what its actual condition may be at the time it results back.

Illustrations.—(*a*) A testator devises realty to trustees upon trust to sell and divide the sale-proceeds between A and B. A predeceases the testator. B survives him. Here a sale is required by the will in order that B may have what the

1. Elliot v. Fischer, 12 Sim. 505.
2. Iarke v. Franklin, 4 K. Q. J. 257.

testator intended to give him, viz., money and not land. B will take his share in money, and as regards the moiety, A's share having lapsed, it will belong to the testator's heir, but he will take as personalty because the testator did not intend that in the event of A being unable to take, A's share should go to his next of kin.

(*b*) A testator bequeaths personalty to trustees upon trust to invest in the purchase of land for A and B. A predeceases and B survives the testator. A's share will go to the next of kin, but he will take as realty.

In case of conversion under deeds when there is partial failure of purposes, the property to that extent results to the settlor and through him it goes to his personal representatives if it is land directed to be converted into money, and to his heir if it is money directed to be converted into land.[1] Subsequent further devolution depends upon its actual character at the time such further devolution arises.[2]

Since the abolition of differences between real and personal estate as regards succession on the owner's death intestate, conversion has lost its practical importance. But so far as the disposition of property by will is concerned, the new legislation does not affect the devolution of property. The doctrine is also applicable and important in so far as there is a difference in the payment of death duties on real and personal estate.

Leading cases.—Flecher v. Ashburner; Ackroyd v. Smithson.[3]

Reconversion is the undoing of notional or imaginary conversion and electing to take property in its actual original state before conversion, or to put it in the words of *Snell,* " It is the notional or imaginary process by which a prior notional conversion is annulled and the notionally converted property is restored in the contemplation of equity to its

1. Wheldale, 8 Ves. 236.
2. Walter v. Maunde, 19 Ves. 231.
3. W. & T. Leading Cases.

original, actual, unconverted quality." Although land directed to be converted into money and money directed to be converted into land is at once impressed in equity with a new character, still it is open to a person receiving the converted property, if not under any disability, to elect to take it in its original state. "Equity, like nature, does nothing in vain." And so it is useless to insist that a person should take the property in the converted form, when he can at any moment annul the conversion.

The person claiming to elect to take the property in unconverted or original form, must be *sui juris* and not a lunatic or an infant. He must also have an absolute interest in the property. Reconversion can take place by (1) *act of parties* or by (2) *operation sf law.*

Reconversion by act of parties.

(*a*) An absolute owner.—The notional conversion may be put an end to by an absolute owner who is *sui juris* by electing to take the property in its actual state, and the court will not direct a conversion against his election, because, when converted, he might immediately reconvert it.

(*b*) Tenants in common.—In the case of tenants in common, the rule is that where an estate is directed to be sold, and the money arising from the sale is to be divided among several persons, all of them must concur in electing to take the estate unconverted, for none of them has a right to say that any part shall not be sold, and elect to take his share in the estate, for to allow election in such a case would be injurious to the sale of the whole. Where, however, money is directed to be laid out in land, to the use of several persons as tenants in common, any one of them may elect to take his share of the money, for the residue of the money may be quite as advantageously invested in the purchase of land as the whole.

(*c*) Tenant in tail.—A tenant in tail of money to be invested in land might, as against his issue, whom he might bar by fine, elect to take it in its actual state.

(*d*) Remainderman.—A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and when the contingency happens, such election will become operative. All he must do is to take care that nothing is done to interfere with the interests of third parties.[1] The election of a remainderman cannot prevent the tenant for life from insisting on a sale of land.

(*e*) Infant.—An infant himself cannot elect, but the court can elect for him or sanction his election after an inquiry whether it is for the benefit of the minor to reconvert.

(*f*) Lunatic.—A lunatic himself cannot elect; his committee may do so on his behalf with the consent of the court; the court directs inquiry whether the reconversion is for the benefit of the lunatic.

(*g*) Married Woman.—Married women can elect as to separate estate under settlement.

Reconversion by operation of law. Two things are necessary, viz., the property must have been in the actual possession of the person entitled—of one who had in him both the next of kin and the heirs[2]—and such person must have died without making any declaration either way.[3] Thus money impressed with real uses at home in the hands of the absolute owner devolves as money.[4]

How election may be made.—A person competent to elect may elect either (1) by express declaration or (2) by

1 Meek v. Devinath, (1877) 6 Ch. D. 572.
2 Wheldane, 8 Ves. 235.
3 Chichester, 2 Vern. 295.
4 Pulteny v. Darlington, 7 Bro. C. C. 550.

acts from which the court will presume an election to have been made. But neither declaration nor act must be equivocal. A bequest by a person absolutely entitled to a fund to be invested in the purchase of land will show a sufficient intention to elect to take the fund as personalty. The court will raise a presumption that a person has made an election from very slight circumstances. It may be inferred from acts showing that the owner intends to take the property in its actual state. Thus, in the case of land to be converted into money, keeping the land unsold for a long time, granting a lease or receiving rents is strong evidence of the eléction to take as real estate. When a person absolutely entitled to money to be laid out in land, receives the capital money from the trustees, he elects to take as money, but not where he receives the income, though for a considerable time.

CHAPTER XIV.

PERFORMANCE AND SATISFACTION.

Performance.—This doctrine is based upon the maxim "*Equity imputes an intention to fulfil the obligation.*" Thus where a person covenants to do an act and he does some other act which is of a kind to be applicable to the performance of the covenant, he is presumed to have had an intention of performing his covenant. The principle of the doctrine of performance is that when A is bound in equity to do something for B, but leaves that thing undone, equity will be astute to seize on something else that he has done, and render that thing available for the benefit of B.[1] The simple illustration of the case of performance is where a person covenants to do a certain act and this covenant is deemed to be performed by some subsequent act which wholly or approximately effects the same purpose, though

1 Hanbury's Modern Equity, p. 387.

it does not expressly refer or precisely conform to the covenant. If a person has covenanted to purchase and settle realty, and after the covenant a purchase is made but the settlement is not made, the purchase would operate as a performance *pro tanto* (if the lands purchased are of less value than those covenanted to be settled); but then the land must have been bought after the covenant and must answer the description in the covenant. The court considers whether the purchase is made with the trust money.[1] Absence of trustee's consent is immaterial.[2]

Another illustration is where a person covenants to do an act and the covenant is in effect wholly or partially performed by the operation of law, thus—where a husband having covenanted to leave his wife some money, dies intestate (so that the wife also gets a share in the distribution of the estate), the question would arise whether the share so obtained by her is a performance of the covenant, or whether she can claim the monoy under the covenant in addition to the share. It has been settled upon the authority of *Blaudy* v. *Widmore*, that the share she obtains on the intestacy will be a performance of the covenant. This general rule is subject to the following exceptions :—

(1) Where the covenantor makes a will, a bequest will not *per se* be considered a performance of the covenant to leave a certain sum, for a bequest *prima facie* imports bounty.

(2) Where the covenant is not to pay a capital sum, but the interest of a sum of money for life, or a mere annuity, the distributive share being a capital sum. But since the Administration of Estates Act, s. 46, under which the widow, upon her husband's intestacy. is entitled to a life interest, her share in the estate might be considered

1 Lichmere v. Carlisle, 3 P. Wms. 211.
2 Sowdon Bro., C. C. 582.

to satisfy a covenant to leave her a life interest or an annuity.

(3) Where the husband covenants to pay a sum to his wife in his lifetime, and there is a breach of the covenant before his death, she will not take her distributive share in performance of the covenant, but if his death occurred before time of the performance of the covenant or even at the time fixed for it, her obtaining a share would be a performance *pro tanto*.[1]

Satisfaction.—The doctrine of satisfaction comes into operation in cases in which a donor being already under some obligation to donee, effects a donation under circumstances which indicate an intention that this shall be taken in satisfaction of the prior obligation[2]

Satisfaction and performance distinguished.— This doctrine also rests upon the same maxim, but **differs from "performance"** in this that whereas in the latter the identical thing agreed to be done is taken to have been done, in the case of satisfaction the thing done is something different from, and is substituted for, the thing agreed to be done. The thing given operates as an extinguishment of the claims of the donee against the donor. This is a presumption for *debitor non presumptur donare*. But nowadays that presumption is not favoured by the courts.

The doctrine of satisfaction rests upon an implied intention of the testator. The doctrine of performance on the other hand, rests on the ground of natural justice. It arises from a construction which equity, in its regard for natural justice, puts upon certain circumstances, rather than from the implied intention of the party. It conspicuously differs from satisfaction as applied to debts in that performance is commonly deemed to have been effected *pro tanto*.

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1 Blandy v. Widmore, W. & T, Leading Cases.
2 Smith's Equity, p. 531.

The cases on satisfaction may be considered under the following four heads :—

(1) Satisfaction of a debt by legacies.—The general rule, as laid down in *Talbot* v. *Duke of Shrewsbury*, is that if one being indebted to another in a sum of money, does by his will give him a sum of money as great as or greater than the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt so that he shall not have both the debt and the legacy. This presumption of satisfaction of a debt by a legacy, however, does not arise if the legacy is less than the debt, or if the debt is contracted after the date of the will or even contemporaneously. If it is less, it is no satisfaction *pro tanto*. This presumption is liable to be rebutted by the existence of certain circumstances, such as express direction in a will for payment of debts[1] or fixing different time for payment of debts and legacies,[2] or if the legacy is of residue only.[3] Thus where one being indebted to his servant for wages in £100 had given her a bond for that sum as due for wages, and afterwards by will gave her £500 for her long and faithful services and directed that all his debts and legacies should be paid, it was held that the legacy was not a satisfaction for the debt due on the bond. The legacy, in order to serve as a satisfaction of the debt, must be definite and not contingent nor uncertain, and must be payable before debts.

In India, the rule as stated in s. 177 of the Indian Succession Act abolishes the doctrine of satisfaction. When a debtor bequeaths a legacy to his creditor and it does not appear from the will that legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as the amount of debt. Where a testator bequeathed Rs. 9,000 to his brother, he having with him Rs. 9,000 deposited by his brother, it was held that the legatee was

1 1. P. Wms. 403.
2 Clarence v. Snell, 3 Alth. 9.
3 Crichton, (1895) 2 Ch. 853.

entitled both to his deposit and also to his legacy.[1]

(2) **Satisfaction of legacy by legacy.**—A legacy may be satisfied by subsequent legacies, if they are both under the same instrument and are equal in amount: but, if they are unequal or if they are under different instruments, the presumption is that they are cumulative and not substitutive[2] except when the legacies are not given *simplicitor* but with a motive which is the same in both the instruments and the sum is the same. Extrinsic evidence is admissible only if the court raises a presumption against double legacies.[3] But where no presumption is raised against double legacies, evidence is not admissible to show that the testator intended the legatee to take one only.

In India, s. 101 of the Indian Succession Act, 1925, lays down the rule as to cumulative or substitutive bequests in much the same way.

(3) **Satisfaction of portion-debt by legacy.**—Sometimes a debt is incurred by a father or mother by way of making provision for a child of his or hers, or a debt is incurred by some person who stands in *loco parentis* to another in favour of that other; such a debt is called a portion-debt. Where the existence of a portion-debt is followed by a legacy to the child, the question arises whether the portion is satisfied by the legacy. The doctrine of satisfaction presupposes that there is some obligation to be satisfied. Where there is a completed gift, there is no obligation, and therefore it cannot require satisfaction. Thus where the father establishes his son in trade and pays Rs. 5,000 and afterwards bequeaths Rs. 5,000, there can be no satisfaction, for there is nothing to be satisfied. But where the father agrees to pay Rs. 5,000 to his son, and subsequently bequeaths Rs. 5,000, there is an obligation, and the question arises whether the subsequent provision is meant to be a satisfaction of the previous obligation. In such a case, the court raises a presumption that the portion-debt is

1 Hasanally v. Popatlal (1912), 14 Bom. L. R. 782.

2 Yokeney, 3 Hare 620.

3 Lee v. Price, Hare, 217.

satisfied by the subsequent legacy either totally or partially. Where the legacy is less than the portion-debt, there is a presumption of satisfaction *pro tanto*. The doctrine of satisfaction holds only where there is a parental or quasi-parental relation, i.e., where the debt is incurred by a father or mother or by some person who has placed himself in *loco parentis* to the beneficiary.

Extrinsic evidence is admissible to rebut the presumption against double portions. In India, s. 178 of the Indian Succession Act abolishes the doctrine of satisfaction of portion by legacy. It states that where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

(4) **Satisfaction of legacy by portion.**—As a general rule, where a parent gives a legacy to a child not stating the purpose with reference to which he gives it, and afterwards advances a portion on the marriage of the child, the presumptiyn arises that it was intended to be a satisfaction or ademption of the legacy either wholly or in part, and the rule is applicable where a person puts himself in *loco parentis*, but no such presumption arises in the case of a stranger or of a natural child. This is because the court leans against double portions.

In India, under s. 179, Indian Succession Act, no bequest shall be wholly or partially adeemed by a subsuquent provision by settlement or otherwise for the legatee.

Presumtions of satisfaction or ademption are but presumptions and can be rebutted by parol evidence of the settler's or testator's intention. The presumption, however, may be rebutted if there is a substantial difference in the nature of two provisions, e.g., agreement to give land would not be satisfied by a legacy; nor would a legacy be adeemed by a gift of stock-in-trade.

CHAPTER XV.

PENALTIES AND FORFEITURES.

What is a penalty.—Where a sum of money is payable as a punishment for a default or by way of securing the performance of a collateral object, that sum is a penalty; e.g., if interest at an increased rate is payable on failure to pay the interest on proper days, then the higher rate is regarded as being by way of penalty. The general principle is that whenever a penalty or forfeiture is imposed to secure some act or benefit, the act or benefit is the principal object and the penalty or forfeiture is merely accessory. Such cases are relieved against in equity. But then the court will not allow a party to escape from his contract merely by paying a penalty in every case[1] (see s. 20, Specific Relief Act). The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money and the court gives him all that he expected or desired.[2]

"Liquidated damages" is an ascertained amount intended to be an assessment of indefinite damages likely to result to one party through the default of the other and agreed to be paid by the party who commits the breach to the other party.

Distinction between penalty and liquidated damages.—It is difficult to distinguish penalty from liquidated damages, i.e., where the whole sum (mentioned, as payable in case of breach) can be recoverd. *Snell* formulates the following rules for the purpose:—

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1 French v. Macale, Q. & D. Wor. 274.

2 Peachy v. Duke of Somerset. (1742) 1 Stra., 447.

(1) If payment of a smaller sum is secured by a larger, the larger sum is always a penalty.

(2) When there is a covenant to do several things and one sum is stated to be paid for the breach of any or all, that sum is in general to be considered a penalty.[1]

(3) But where the sum payable is proportioned to the breach,[2] or

(4) If the sum is payable on one particular breach and there is no means of ascertaining the precise damage, the sum is not penalty at all but is liquidated damages.[3]

(5) The mere use of the term penalty or liquidated damages is not conclusive; it depends upon the circumstances of the case.

(6) When the expressions are ambiguous and doubtful, equity inclines towards construing the sum as a penalty; but it must be noted that the mere largeness of the sum does not of itself make it a penalty.[5]

It has been ruled in *Wallis* v. *Smith*[6] that the parties have the option to fix a sum as the just amount of damage; but if it is so disproportionate as to be in reality a penalty, equity will relieve against it.

Relief against penalties—Equity relieves against penalties when the intention of the penalty is to secure the payment of a sum of money or the attainment of some other object, and when the event upon which the penalty is

1 Kemble v Farran, 6 Beav. 14.
2 Wilson v. Love, (1896) 1 Q. B. 626.
3 Law v Local Board of Redutch, (1892) 1 Q. B. 27.
4 Green v. Price, 16 M. & W. .
5 Ibid.
6 346 21 Ch. D. 243.

made payable can be adequately compensated by payment of interest or otherwise.[1]

Indian law—Section 74 of the Indian Contract Act makes provision for this; it does away with the distinction between penalties and liquidated damages.

Forfeitures.—The court is governed by the same general principles in relieving against forfeiture clauses—other than forfeitures arising under wills and settlements and other than forfeitures arising under leases and other strict contracts.[2] In England, the courts of equity from very early times relieved against forfeiture for non-payment or rent—for forfeiture in such cases was regarded as security for the payment of rent. Even the courts of law granted relief in suits for ejectment for non-payment of rent where the lessee brought the amount of rent into court. Now s. 146 of the Law of Property Act provides for relief against forfeiture generally and enacts that a forfeiture shall not be enforceable for breach of any condition or covenant until the lessor has given the lessee notice requiring him to remedy the particular breach and to make compensation, and the lessee fails to comply with it within a reasonable time. The section does not apply to a condition of forfeiture on bankruptcy or execution or a convenant in a mining lease for permitting inspection by the lessor. But there can be no relief if the lessor has actually entered thereon. Where forfeiture is imposed not by act of parties but by statute, equity will give no relief.

It being a condition of granting relief against a penalty or forfeiture that proper compensation for the breach of the agreement shall be made, it follows that where there are no means of ascertaining what amount of compensation would be equitable, no relief will be given.

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1 Halsbury's Laws of England, Vol. XIII, p. 150.

2 Warner v Moore, 25 Ch. D. 605.

In the case of forfeiture of shares for non-payment of calls, equity on the ground of public policy has refused to interfere. Similary, the court will relieve a purchaser from the forfeiture of deposit on sale of immovable property if he fails to complete the purchase within a reasonable time.

Indian law—Under s. 114 of the Transfer of Property Act the court will grant relief to the lessee against forfeiture for non-payment of rent, if at the hearing of the suit in ejectment the lessee tenders to the lessor the rent in arrear together with interest and full costs of the suit.

The words "rent in arrear" in s. 111 of the Transfer of Property Act mean rent accrued due up to the date when relief is granted, and not only rent claimed in suit.[1]

S. 114A provides for relief against forfeiture for breach of an express condition by making it obligatory on the lessor to serve the lessee with notice specifying the breach and requiring the lessee to remedy the same before enforcing the forfeiture clause by filing a suit for ejectment.

CHAPTER XVI

MORTGAGE.

What is a "mortgage"—The requisites of a mortgage.—Valid attestation.—Different kinds of mortgages.—Remedies in case of different mortgages.—Gahan Lahan mortgage.—Mortgage distinguished from sale with condition for repurchase.—Usufructuary mortgage.—English mortgage.—Equitable mortgage.

What is a mortgage?—A mortgage is "the transfer of an interest in specific immovable property for the purpose

1 The Dhurrumtolla Properties Ltd v. Dhunbai Feroshaw Sorabjee (1931) 58 Cal. 311.

of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability." The transferor is called the mortgagor, the transferee the mortgagee, and the instrument the mortgage-deed (s. 58, Transfer of Property Act). The Transfer of Property Act speaks of mortgages of immovables only, while the definition given in the Stamp Act includes mortgage of movables also ; the one speaks of engagements generally, the other particularly of those which create pecuniary liability. *Fisher* defines a mortgage very widely as "a security upon property for the performance of an engagement." While *Coote* calls a mortgage "a debt secured by a pledge." Thus, a mortgage in England implies a loan, i. e., a debt, though it is not necessarily so in India. Again under the English Law prevailing before the Law of Property Act of 1925 the whole of the interest of the mortgagor passed to the mortgagee in law, though in equity he had a right of redeeming that interest. In India since the passing of the Tranfer of Property Act the distinction drawn in England between law and equity in such cases does not exist. The Act has left no room for such a distinction.[1] The Indian mortgagor however retains some rights though the English rules of equity do not apply. He retains a right to reconveyance of the land and a right to transfer such right by way of sale or mortgage and this right in India is a legal right.[2] In India there is no equity of redemption in the mortgagor and there being no distinction between the legal and equitable estate, his 'whole estate' is not transferred by the mortgage.[3]

Requisties.—No particular form of words is necessary to constitute a mortgage ; it is sufficient to show an inten-

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1 Bengal National Bank v. Janki Nath 54 Cal.; 813 Ram Kinkar v. Satyacharan 41 B. L. R. 672=66 I A 50.

2 S. s. 81, 82, 91 & 94 T. P. Act.

3 Vithal v. Rajebahadur 29 Bom. 391; Thuthalen v. Eralpad 40 Mad. 1111; Pala Kista v. Jagannath. 59 Cal. 1314.

tion on the part of the debtor to create a security but it must be clearly expressed ; so a bare covenant on the part of a debtor not to alienate property, without any further words which may go to show an intention to create a security, does not constitute a mortgage.[1] If such an intention is clear, then the mere fact that a stipulation is put in for re-purchase cannot prevent the debtor from redeeming.[2] The best *test* is laid down in a leading equity case[3] thus, "Are the remedies of the parties mutual and reciprocal?" If so, it is a mortgage ; if not, it is not a mortgage. Mutuality is absolutely necessary. S 58 essentially requires that an interest in specific immovable property must have been transferred as a security for the payment of the debt ; so if in consideration of a loan received, the debtor transfers his property to the creditor for a period by which time the whole debt is understood to be liquidated, and after the stipulated period the creditor is to restore the property free from the mortgage lien, the agreement is not a mortgage ; similarly also if the parties agree that after the expiration of such a period the mortgagee shall remain in possession of the property for a fixed period and then restore the property free from any claims.[4] What the law requires is that *the interest in specific immovable property must have been conveyed by way of security.*[5] Immovable property must be properly and distinctly specified.

Prob.—Is a valid mortgage created in any of the following cases :—

(1) The debtors describing themselves as residents in a certain place, said in an instrument, " we

1 Najimulla v. Nasir, 7 Cal 196.

2 Bepuji v. Senavari, 2 Bom. 24.

3 Howard v. Harris, 2 W. & T. Leading Cases, 11.

4 Abdullabhai v. Kashi, 11 Bom. 462.

5 Vasudev v. Bhau, 21 Bom. 528.

hypothecate as security for the amount all our rights and interests."

(2) In a similar instrument the debtors promise to pay the debt by instalments, saying, "if the debt is not paid up, we shall pay it with the whole of our property."

(3) A debtor borrowed money saying, "I promise to pay the principal in the month of August and till then I shall not transfer any property by conditional sale or mortgage"?

A.—(1) and (2) Though no special form of words is required to create a mortgage, it must at least appear from the instrument that an interest in specific immovable property was transferred and a security was intended; in these cases the words are too vague and there is no intention to create a security, nor is property identified specifically.[1]

(3) It has been held that a mere covenant by the debtor in the instrument not to alienate the property does not create a mortgage, unless the words show an intention to pledge specific immovable property. In this case all that the debtor promises is not to alienate till the debts were paid off; the words do not, therefore, constitute a mortgage.[2]

Prob.—A, in consideration of a debt of Rs. 500, passed a document called a debt-note to B, providing that B should enjoy a piece of land belonging to A for 20 years and at the end of that period restore the land to A free from all the claims for Rs. 500 or any interest thereon. Is this a mortgage or not?

A.—No; it is not a mortgage. All that is necessary to create a mortgage is that one party must transfer to another

1 Deojit v. Pitamber, I All. 275.

2 Bheri v, Madipatir, 3 Mad. 35.

interest in specific immovable property as a security; here it is not so. The debt is to be liquidated by the enjoyment of the property for a certain number of years. As *West, J.*, observed in an earlier case, such a transaction is a mere debt-note and not a mortgage.[1] To determine whether it is a mortgage or not, the test laid down in the English case of *William* v. *Owen*, that the remedy must be mutual, i. e., one party must be entitled to redeem and the other to foreclose, should be observed. In this case, applying this test, it appears that there was not such a mutuality of remedy; and hence there is no mortgage.

Mortgage how made—When the sum secured is Rs. 100 or more, the mortgage (except in the case of an equitable mortgage) can be effected by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than Rs. 100 it may be effected either by an instrument signed and attested as above or (except in the case of a simple mortgage) by delivery of possession (s. 59). The definition of "attested" has been newly added. "Attested" in relation to an instrument means, and must be deemed always to have meant, attested by two or more witnesses each of whom (1) has seen the executant sign or affix his mark to the instrument, or (2) has seen some other person sign the instrument in the presence and by the direction of the executant, or (3) has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary.[2] If the document is not

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ngh v. Latafat, 3 Cal. 336.

2 S. 2 of T. P. Act, 1929.

attested as required by law, it cannot operate as a mortgage, nor can it operate as a charge.[1] But the invalidly attested deed is admissible as evidence of the personal covenant to pay.[2] If the deed is validly attested it must be proved according to sections 68 to 71 of the Indian Evidence Act.

If the mortgage-deed is not registered, it cannot be acted upon as evidencing the mortgage[3] (ss. 48, 49, 50, Registration Act), nor can the mortgage, invalid for want of registration, be converted into a charge under s. 100 of the Transfer of Property Act. A mortgage is not complete *until it is registered, and it takes effect from the date of* execution. Though an unregistered deed of simple mortgage is not receivable in evidence for the purpose of affecting immovable property, it will be received as evidence of a personal obligation to pay.[4] It may also be admissible to prove an acknowledgment of liability sufficient to save limitation.

What can be mortgaged—It is only interest in specific immovable property that can be the subject of mortgage; merely personal rights cannot be. The property must be sufficiently described; if the description is indefinite, oral evidence is admissible to identify it. All kinds of property are, as a rule, mortgageable, e.g., hereditaments whether corporeal or incorporeal, and personal estates whether in possession or in action, and whether the estate therein be for life or absolute, vested, expectant or contingent, but profits of an ecclesiastical benefice, pew rents, estates of a charity, separate estate of a married woman without power of *anticipation, are not mortgageable. As regards capacity* to take a mortgage, it is sufficient to state that any person

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1 Samoo Patter v. Abdul Samad, (1908) 31 Mad. 337. See also s. 100, T. P. Act.

2 Pulaka Veetil v. Thiruthipalli, (1909) 32 Mad. 410.

3 Shashi Bhushan, 33 Cal. 864.

4 Vani v. Bani, 20 Bom. 553.

capable of holding property may be a mortgagee Even a minor may be a mortgagee[1] for, the disability of a minor to contract does not disqualify him from being a transferee. If a company with a power to borrow, mortgages its undertaking, the mortgage extends even to the profits.[2] Even calls may be mortgaged.

Different kinds of mortgages.—(*i*) *Simple mortgage*; s. 58 (*b*) defines this form thus:—"Where, without delivering possesion of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied so far as may be necessary in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

(*ii*) *Mortgage by conditional sale.*—Where the mortgagor ostensibly sells the mortgaged property, on condition that on default of payment of the mortgage-money on a certain date, the sale shall become absolute, or, on condition that on such payment being made, the sale shall become void, or on condition that on such payment being made, the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale,[3] provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(*iii*) *Usufructuary mortgage.*—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to

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1 Raghava Chariar v. Srinivas, 40 Mad. 308 (F.B)

2 Gardner, L. R. 2 Ch. 201.

3 S. 58 (c), Transfer of Property Act.

the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage.[1]

(*iv*) *English mortgage*—Where the mortgagor binds himself to repay the mortgage-money on a certain date and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.[2]

(*v*) *Mortgage by deposit of title-deeds*—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, and Akyab, and in any other town which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf, delivers to a creditor or his agents documents of title to immovable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.[3]

(*vi*) A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of s. 58 is called an anomalous mortgage;[4] in such cases the rights and liabilities are determined by their contract as evidenced in the mortgage-deed, and so far as such contract does not extend by local usage.

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1 S. 58 (d), Transfer of Property Act.

2 S. 58 (e), Transfer of Property Act.

3 S. 58 (f), Transfer of Property Act.

4 S. 58 (G), T. P. Act.

Difference—In a simple mortgage the mortgagor does not give up possession of the mortgaged property to the mortgagee, nor permits him to enjoy its usufruct, nor does he stipulate to make an absolute transfer of it in the event of non-payment. The remedy of the mortgagee is by a suit, and sale under the decree obtained. As soon as the sale takes place, the right of redemption of the mortgagor is extinguished. There can be no foreclosure in such a mortgage. In a usufructuary mortgage the debtor parts with the right to possession and the enjoyment of usufruct is transferred ; such a mortgagee cannot sue for either foreclosure or sale. In an English mortgage and one by conditional sale, it is the ownership that is transferred with a condition ; it passes with the property itself; the latter can sue for foreclosure only and not sale ; while an English mortgagee can sue for both foreclosure and sale.

Remedies of a mortgagee (s. 67).—(1) He can obtain a decree for foreclosure or sale of the mortgaged property ; this he can do at any time after the mortgage-money has become payable to him and before a decree has been made for the redemption of the mortgaged property or the mortgage-money has been paid or deposited. By foreclosure is meant that the mortgagor shall thenceforth be debarred from his right to redeem the property. A mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, cannot institute a suit for foreclosure. Nor can a usufructuary mortgagee as such or a mortgagee by conditional sale as such institute a suit for sale.[1] But then a mortgagor who holds the mortgagee's rights as his trustee or legal representative and who may sue for a sale of the property, cannot institue a suit for foreclosure ; so also the mortgagee of a railway, canal or other works in the maintenance of

1 S. 67 (a), Transfer of Property Act.

which the public are interested, cannot sue for foreclosure or sale at all. Like redemption this right is also single and indivisible, and so a person interested in part only of the mortgaged property cannot sue for his part only, except when the mortgagees have, with the consent of the mortgagor, severed their interests. The period of limitation for suits for foreclosure and sale is 60 years under Article 147 of the Limitation Act.

(2) He can sue the mortgagor personally for money (s, 68).

(3) He can sell the mortgaged property out of court (s. 69).

(4) A mortgagee having the right to exercise a power of sale under section 69, shall be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

What is a "Gahan Lahan" mortgage—Section 58 (*c*) of the Transfer of Property Act defines the kind of mortgage known as mortgage by conditional sale thus:

" Where the mortgagor ostensibly sells the mortgaged property (1) on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or (2) on condition that on such payment being made the sale shall become void, or (3) on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

" Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale."

This form of security is known in *Bombay* as *Gahan Lahan* mortgage, in *Bengal* as *Bye Bil Wufa*, and in *Madras* as *Mudatakriyam.* It is of the essence of this mortgage that on failure of the mortgagor to redeem, i. e., discharge the debt, the mortgaged property shall absolutely pass to the mortgagee as owner; but in the Bombay Presidency particularly these *Gahan Lahan* mortgages are held redeemable though the time fixed has expired, on the principle "once a mortgage always a mortgage." This view was expressed first in an old case in 1864[1] and has been followed in many subsequent cases.[2]

Remedy.—Section 67 of the Transfer of Property Act rules that a mortgagee by conditional sale cannot sue for sale; he can claim foreclosure only.

Mortgage distinguished from the sale with a right of repurchase.—Formerly there existed a practice both in England and in India of debtors executing an absolute conveyance, and creditors in their turn agreeing to reconvey the property on payment of the loan. They were called redeemable sales and held identical with a mortgage.

But now it is clearly opined that a mortgage is not identical with, but must be distinguished from, a sale with a condition for repurchase within a certain time.[3] The two resemble each other in form but differ widely in their antecedents. Whether a given transaction is a mortgage or a *bona fide* sale with right of repurchase depends on the circumstances of each case. In England, parol evidence is admissible to show that what appears apparently to be an out and out sale is really intended to be a mere security. The maxim "Equity looks to the spirit and not the letter" is applied in such cases and so a court does not regard the

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1 Ramji v. Chinto, 1 Bom. H. C. 194.

2 Bapuji v. Senavarji, 2 Bom. 231.

3 Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421.

form of the instrument as conclusive, but goes into its contents and tries to see the relations constituted by the agreements between the parties. Everything depends upon the intention of the parties, and so no general test can be laid down; the following rules are, however, deduced from the leading English and Indian cases on the point.

The transaction may be a mortgage:—

(1) If the person paying the money is not put into possession.

(2) If the expense of preparing the instrument is paid by the person to whom the money is paid.

(3) If there is a stipulation to pay interest.

(4) If the money paid by the person making the payment would be a grossly inadequate price.

(5) If the person (making the payment) having been put into possession, has accounted for the rents to that other.

(6) If there is any other conduct on the part of the ostensible vendee showing that a debt was due to him from the other party.

Each of the above is an indication more or less cogent of the intention of the parties to regard the transaction as a mortgage (security) and not an absolute sale. But none of them is conclusive though it goes a great way to guide the *final result.*[1] It may however be noted that under the

1 Williams v. Owen, 2 My. & Cr. 330; Alderson v. White, 2 D. & J. 97; Howard v. Harris, 2 L. C. 11; Bapuji v. Senavarji, 2 Bom. 231; Baksu v. Govind, 4 Bom. 597; Govind v. Jesha, 7 Bom. 73; Abdulabhai v. Kashi, 11 Bom. 462, Vasudev v. Bhau, 21 Bom. 558; Ranchod v. Bhikhabhai, 21 Bom. 704; Bapu v. Bhavani, 22 Bom. 245; Bhagwan v. Bhagwandin, 12 All. 387; Ayyangar v. Rahimnisa, 14 Mad. 170.

amended Transfer of Property Act it is laid down that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

Test—Primary test is that there should be a debt to constitute a mortgage; the dictum in *Alderson* v. *White*, i.e., "no debt, no mortgage," is followed in India. In doubtful cases the inclination of the court is to construe favourably to the debtor claiming to redeem.

Effect of the distinction.—It must be noted that when there is a real sale with a condition for its repurchase within a given time, it cannot be treated as a mere security, while if the transaction in its inception is intended as a security for money it is always a mortgage and is redeemable notwithstanding an express agreement that it shall not be redeemable.

The distinction is important, since if the transaction is a mortgage, the mortgagor has the right to redeem though the time for repayment has expired; but if it is a sale, the time for repurchase must be strictly observed.

Again, in the case of a sale with a right of repurchase, if the purchaser dies the sale money goes to his real representative; in the case of a mortgage, the mortgage-money goes to the personal representatives of the mortgagee.

Usufructuary mortgage—Section 58 of the Transfer of Property Act defines it thus:—"Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of mortgage-money and to receive the rents and profits or any part of such rents and profits in lieu of interest or in payment of the mortgage-money or partly

in lieu of interest and partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage."[1] In England, formerly three kinds of mortgages were recognized, of which the Welsh mortgage and partly the *Vivum Vadium* correspond with the usufructuary mortgage in India. (In that mortgage there was no condition or covenant for repayment, the main incident of the security being the possession by the mortgagee of the mortgaged property until he had repaid himself out of the rents and profits ; the mortgagor there could claim to redeem, but the mortgagee could not sue for foreclosure or for the debt.) This form of security is very common in India. No formal words are necessary to constitute this kind of mortgage. The definition given above specifies three classes of such mortgages. It has been said that the definition given is narrow and would exclude cases where the mortgagee is let into possession for a term or where a part only of the rents and profits are received by him ; but as a matter of fact, whenever possession is given over, the security should be termed a usufructuary mortgage. Very often it becomes difficult to distinguish such a mortgage from a lease ; but the only useful test for such purposes is to look at the intention of the parties ; if there is a debt with the security of land for its payment, the transaction is a mortgage.

Remedies of a usufructuary mortgagee—In a pure usufructuary mortgage the mortgagor is not personally liable and the mortgagee can look to the land only for the repayment of his debt ; he can sue him personally only if there is a personal covenant by the mortgagor to pay ; and so nowadays mortgagees who take possession get such a clause put in the deed for safety's sake. By suing for the money the mortgagee may be taken to have waived his right to proceed against the mortgaged premises. The old

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1 Dibbent, (1896) Ch. 348.

case of *Jagjiwandas*[1] is not to be construed strictly. As has been held by the Allahabad and Bombay High Courts, a usufructuary mortgagee whose possession is not disturbed cannot sue for foreclosure or sale, or for the mortgage-money.[2] The Bombay High Court allows a right to have it sold if there is a personal covenant, in which case it is something like a simple mortgage. Section 67 of the Transfer of Property Act clearly lays down that a usufructuary mortgagee cannot institute a suit for foreclosure or sale.

In the case of a usufructuary mortgage, the mortgagor can sue to reover possession of the mortgaged property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee (s. 62):—

(*i*) Where the mortgagee is to be paid his money from rents and profits when such money is paid.

(*ii*) Where he is to be paid only out of such rents and profits, only when the period prescribed for payment has expired and the principal money is paid up or deposited in court.

The mortgagor has in such cases to bring a suit for an account with a prayer for redemption.

English mortgage—Section 58 of the Transfer of Property Act defines an English mortgage thus:—" When the mortgagor binds himself to repay the mortgage-money on a certain date and transfers mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the trasaction is called an English mortgage. " Taking this with the definition of mortgage by conditional sale, it will appear that both resemble each other and are much analogous inasmuch as, in both, the ownership of the property pledged is liable to be transferred from the debtor to the creditor on default of payment ; but the difference between them is that in an English mortgage

1 Jagjivandas V. Ramdas, 2 M. I. A.

2 Umda V. Umrao Begum 11 All. 367 ; Sadashiv, 20 Bom. 296; Mahadji V. Joti, 17 Bom. 425.

the mortgagor enters into a covenant to repay the debt ; such a covenant, if not clear, is implied ; while in a mortgage with conditional sale the mortgagor does not necessarily make himself personally liable for the payment of the mortgage-money. The instruments also differ. In an English mortgage the ownership is wholly transferred to the creditor, liable, however, to be divested by the repayment of the loan, while in a mortgage by conditional sale the mortgagee gets a qualified ownership likely to ripen into perfect ownership on default of the debtor. In the former, the mortgagee, in the absence of a contract to the contrary,has a right to enter into possession of the property from the date of the deed–not so invariably in the case of a mortgage by conditional sale[1] It has to be noted that if the debt is not repayable on a certain date, the mortgage is not an English mortgage. The term specified is usually six months from the date of the deed, though it is seldom intended by the mortgagor that the principal is to be paid on the day named.

Essentials.—(*i*) The mortgagor should bind himself to repay the mortgage-money on a certain date ; (*ii*) the property should be transferred absolutely to the mortgagee ; (*iii*) the transfer must be with a proviso for reconveyance to the mortgagor on payment by him of the mortgage-money.[2]

Remedy.—In an English mortgage, if any of the conditions are unfulfilled, the mortgagee can institute a suit for sale, or sell the property without the intervention of the court under section 69 (*a*), Transfer of Property Act.

Taking possession.—The position of a mortgagee in possession is full of peril, and a mortgagee should not, except under the strongest pressure, assume possession and certainly never when he can get a receiver.[3] By appointing a receiver, a mortgagee can obtain the advantages of possession without its drawbacks. It secures the due

1 Shrinath v. Khetar, 16 Cal. 693.

2 Narayau, 25 Mad. 220.

3 Rigby, L. J, in Gaskell v. Gosling, (1896) 1 Q. B. 669.

payment of interest; moreover, since he cannot himself charge for personal trouble and a receiver can be paid, the mortgagee is saved the trouble; there are, besides, none of the liabilities mentioned in s. 76.[1]

Equitable mortgages.—As a rule, mortgages are generally created by express deeds and contracts of parties, but they are sometimes implied from the nature of the transaction between the parties; such mortgages are termed equitable mortgages. The Statute of Frauds in England stood in the way of these, but in course of time the leading case of *Russell* v. *Russell* established the validity of such transactions creating an equitable mortgage by deposit of title-deeds. Such a deposit is construed by a court of equity as an agreement to execute a legal mortgage if and when required by the mortgagee.[2] In England, equitable mortgages arise in three ways—(*a*) by a formal mortgage of the equity of redemption, (*b*) by agreement that a mortgage shall be given, (*c*) by deposit of title-deeds; and it is this last that is very common. Such mortgages are allowed in India under s. 58 (*f*) of the Transfer of Property Act, but only if made in the Presidency towns, i.e., Bombay, Madras, Calcutta, Karachi, Rangoon, and some other places in Burma, though the property to which they relate may not be within their limits.[3] The towns mentioned above refer to the place where the documents of title to immovable property are to be delivered, and not to the situation of the property mortgaged. The property may be situated outside the towns named, even outside British India, e.g., in Baroda, but the transaction must be effected within the towns mentioned.[4]

Snell defines an equitable mortgage as a debt secured upon equitable estate or interest in the land or secured by

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1 In re Pape, 17 Q B. D. 749.

2 Wright, 19 Ves. 258.

3 Varden v. Luckputy, 9 M. I. A. 303

4 Central Bank of India v. Nusserwanji, 34 Bom. L. R. 1384.

an equitable charge only, or by some other assurance whereby the legal estate does not pass, or secured by deposit of title-deeds or other documents of title.

In India, there is no distinction between a legal and an equitable mortgage as in English law where the legal mortgage will always prevail against the equaitable unless the holder of the legal has done or omitted to do something which prevent him in equity from asserting his paramount rights.[1]

Essentials.—In order to constitute such a mortgage—

(1) Actual delivery of title-deeds is necessay and mere oral agreement to make a deposit is not sufficient, for it is the actual delivery that can give some rights to the mortgagee and, as held in *Sham* v. *Forster*,[2] it operates as evidence of an agreement on the part of the depositor to execute a mortgage and the depositor can have claims against all who cannot prove themselves to be *bona fide* purchasers for value. It would if the agreement is in writing.

It is not necessary that all title-deeds must have been deposited; those that are material may be delivered over; the only thing equity looks to is the presumed intention that the deposit is for the purpose of creating a mortgage. If the title-deeds are not deposited with *intent to create a security thereon,* there is no equitable mortgage.

A mortgage by deposit will cover all future advances if such was the agreement when the first advance was made, or if there is an implied agreement at the time of the subsequent advance that the deeds were to remain as security for it as well.

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1 Imperial Bank of India v. U. Rai Gyaw Tha & Co., Ltd., 50 I. A. 283.

2 Sham v. Forster, 5 H. L. 340.

Priorities.—An equitable mortgagee who parts with the title-deeds and so enables the depositor to make another equitable mortgage, is postponed to that second equitable mortgagee. There must be some positive act, e. g., long and inexcusable neglect.[1] A legal mortgagee is not postponed to prior equitable mortgagee if the former has made *bona fide* inquiry for title-deeds; in other words, he has no notice of the equitable mortgage.

Remedies.—The new s. 96 of the Transfer of Property Act puts equitable mortgages on the same footing as simple mortgages, and thereby makes it clear that the remedy of the mortgagee by deposit of title-deeds is by suit for sale. Prior to the new enactment, according to the Bombay High Court, the mortgagee by deposit of title-deeds could institute a suit for sale, as well as for foreclosure.[2]

Limitation.—Article 132 of the Limitation Act applies to suits to enforce the payment of advances secured by mortgage by deposit of title-deeds, and the mortgagee must enforce the remedy within 12 years.

Registration—An equitable mortgage is created not by writing but by the deposit of title deeds with the intention of creating a security. Sometimes such a deposit is accompanied by a memorandum. If the memorandum constitutes the bargain between the parties and is not merely the record of an already completed transaction it must be registered under the Registraction Act, though no registration is necessary under the Transfer of Property Act.[3]

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1 Rice v. Rice, 2 Drem. 73.

2 Maneckji v. Rustomji, 14 Bom. 569.

3 Subramaniam v. Lutchman. 50. I. A. 77; Pranjivandas v. Chan Ma Phee, 43 I. A. 122.

CHAPTER XVII.

The rights and liabilities of a mortgagor.—Equity of redemption.—Clogs.—Redeem up and foreclose down.—Who can redeem.—Redemption piecemeal.—Implied covenants in a mortgage.—Power of mortgagee to sell out of court.—Right to sue the mortgagor personally.

Rights of a mortgagor—The mortgagor has an invariable right to redeem at any time after the principal money has become due, provided that the right has not been extinguished by act of parties or by decree of a court. The right of redemption continues although the mortgagor fails to pay the debt on the due date, for the mortgage is only a security for the debt. In England, the mortgagor's right of redemption is called the equity of redemption, because the courts of equity allowed the right to continue even after default on the due date. No condition or provision can fetter this right of redemption which is a statutory right. Any such condition or provision is void as a clog on redemption, for the right is based on the *maxim* " Once *a mortgage* always a mortgage. " The right is single and indivisible. The mortgagor's right of redemption and the mortgagee's right of foreclosure or of sale are co-extensive.

The mortgagor, as long as his right of redemption subsists, has a right to inspection and production of documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.[1]

As to how far consolidation can be allowed, see s. 61.

1 S. 60 (B), Transfer of Property Act.

Waste—If the mortgagor himself be in possession of the mortgaged property, he is not liable to the mortgagee for allowing the property to deteriorate ; but he must not commit any act which is destructive or permanently injurious thereto if the security is insufficient or will be rendered insufffcient by his act. The English law on the point is similar to the law in this country as laid down in s, 66. A security is said to be insufficient unless the value of the mortgaged property exceeds by one-third or (if it consists of building, exceeds by one-half the amount for the time being due on the mortgage. The mortgagor in possession is a tenant at sufferance and is not bound to account for rents and profits during the period. He is at liberty to exercise the ordinary rights of property and is not liable for permissive waste; but the interests of the mortgagee require that he should not be allowed to diminish the value of the property and so impair the security of the mortgagee; hence the restriction in the section.

A mortgagor is in case of a usufructuary mortgage authorized to bring a suit for the recovery of property mortgaged under s. 62 under certain circumstances.

Right to accessions—If the mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor upon redemption shall be entitled as against the mortgagee to such accession. The principle is that the acquisitions during the period are to enure for the benefit of the mortgagee and are to be treated as accretions to the mortgaged property and, therefore, subject to redemption. This principle of English law is contained in ss. 63 and 70 of the Transfer of Property Act, the latter of which says that any accession to the mortgaged property made after the date of the mortgage shall remain with the property and the mortgagee will be entitled to it for the purpose of his security. It must be noted that, if the accession is acquired at the expense of the mortgagee and is capable of separate

possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expenses of acquiring it; but if such separate possession is not possible, the accession must be delivered with the property, and if that acquisition was a necessary one to preserve the property from destruction, forfeiture, or sale, or was made with the mortgagor's consent, he would be liable for the proper costs thereof with interest. The profits (in that case) arising from the accession naturally go to the mortgagor.

Again, if the mortgaged property is a lease for a term of years and the mortgagee obtains a renewal of the lease, the mortgagor shall upon redemption, have the benefit of the lease; similarly, if the mortgagor obtains a renewal of the lease during the mortgage, the mortgagee shall for purposes of his security be entitled to the benefit of the renewed lease (ss. 64, 71 of the T P. Act).

A mortgagor is liable to be foreclosed—debarred of his right to redeem—on default of paying the amount due only in case of mortgage by conditional sale, or of an anomalous mortgage, where the deed so provides.[1]

Improvements to mortgaged property—Where the mortgagee in possession has made improvements on the mortgaged property, the mortgagor shall on redemption be entitled to the improvement and the mortgagor shall not to liable to pày the costs thereof except where such improvement was necessary to preserve the property from destruction or deterioration, or where it was made in compliance with the lawful order of any public servant or authority (s. 63A).

He can be sued personally for mortgage-money (s. 68).

Equity of redemption.—It is the interest which

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1 S. 67 (a), Transfer of Property Act.

resides in the mortgagor before foreclosure, i.e., which remains with him after the property is mortgaged and which enables him, on payment of the debt, to recover the property from the mortgagee. In England, under the old common law a mortgage was taken as being simply a conveyance upon condition and if the condition was not performed, the mortgagee's estate became absolute and the legal right to redeem was lost for ever. Equity, however, came to regard such a transaction as a mere security, and held that the mere breach of the condition to pay up in time should be relieved against. The mortgagor, though he lost his legal right to redeem, had an equity to redeem on payment within reasonable time of principal, interest and costs; the maxim "Equity looks to the spirit and not the letter" was applied. Equity did not rest here; but fully realizing the hardships of a debtor and the solemn agreements into which he is tied down in the moment of necessity, it further ruled that the debtor could not by any stipulation made at the time of the loan, deprive himself of his equitable right to redeem, and the creditor was thus prevented from obtaining any collateral advantage beyond his principal, interest and costs; hence was deduced the equitable doctrine "*once a mortgage always a mortgage*," i e., that an estate cannot at one time be a mortgage and at another time cease to be so by one and the same deed.

It must be noted, however, that a mortgagor may by a subsequent act extinguish his equity of redemption. A mortgagee can in that case purchase the equity of redemption of the mortgagor. This principle is discussed in the leading equity case of *Howard v. Harris.*

As to whether, when a mortgage is paid off, the charge (equity of redemption) is extinguished or retained, is a question of intetion.

Nature of the equity of redemption—Equity of redemption is not a mere right but is an estate in the land,

and the person in whom it remains is the owner entitled to deal with it in any way he likes, subject to the first encumbrance. He can settle, devise, or even mortgage the land again. Formerly, it was used to distinguish the "interest of the mortgagor" which was left from the " estate " which was deemed to have passed on to the mortgagee, but as said above, courts of equity in course of time construed upon that interest and gave it all the incidents of an equitable estate in the land.

Price of redemption is the principal, interest and mortgagee's costs (not the costs of the mortgage-deed). The mortgagee can add to this commission. An auctioneer's statement in the deed of the amount of the principal is good and strong evidence of the sum lent.

Mortgagor's estate—By the Judicature Act of 1873 he can (except where the mortgagee has given notice of his intention to take possession or to take profits) sue for possession, rents and profits, prevent trespass, etc. He can cut and sever crops, sell underwood, and is not accountable for rents and profits accruing while he was in possession. A mortgagor in possession can now, under s. 99 of the Law of Property Act, 1925, give a valid lease of the property binding on the mortgagor though he could not do so formerly ; but the lease cannot, if it is agricultural, exceed 21 years ; and if it is for building, it cannot exceed 99 years. These provisions do not extend to mining leases (*Snell*). A lease validy given is binding even after foreclosure on the mortgagee.[1] The mortgagor's power to lease is set out in s. 65A of the Transfer of Property Act, subject to any express provision in the mortgage-deed.

Limitations on the mortgagor's right to redeem—The rule is that the right to redeem and the right to foreclose are co-extensive i. e., in the absence of any express statement of the intention in the mortgage-deed the

1 Brown v. Peto, (1900) I, Q. B. 346.

mortgagor cannot redeem before the mortgagee can foreclose. Thus a mortgagor can claim to redeem only on the day fixed for it and not before it. Similarly, a mortgagee cannot call for the payment before the time fixed. This principle as recognized in the English case of *Brown* v. *Cole*[1] is followed in *Vadji* v. *Vadji*.[2]

These rights are co-extensive to this extent, that if one is postponed the other is presumed to have been intended to be postponed.[3] There cannot be a stipulation postponing the mortgagor's rights to redeem, and giving the mortgagee the power to call for satisfaction at any time. Section 60 of the Transfer of Property Act also provides that the mortgagor can claim to redeem (i. e., to require the mortgagee to deliver the mortgage-deed, to deliver the possession of the mortgaged property if the mortgagee is in possession of it, and at his own cost to get a reconveyance of the property or an acknowledgment that his claim is satisfied) at any time after the principal money has become payable and then on payment or tender at a proper time and place of the mortgage-money; but this is if the equity of redemption is not extinguished by act of parties or by order of court.[4]

The maxim "*Modus et conventio vincunt legum,*" i. e., what is written down in the agreement is binding, does not apply to mortgages; i. e., a debtor cannot, even by the most solemn engagement entered into at the time of the loan preclude himself from his equitable right to redeem. Whatever clause or covenant there might be in the conveyance, yet if the intention of the parties is such that such a conveyance shall be a mortgage only or shall pass only a redeemable estate, a court of equity would so construe it.[5]

1 14 Sim. 427.
2 5 Bom. 22.
3 Sayad Abdul v. Gulam Jalam, 20 Bom. 677.
4 Tiruganana v. Nilalamatri, 16 Mad. 486; Lilu v. Vasudev, 1 B. H. C. 283.
5 Ibid.

If the time fixed for payment of the principal money has been allowed to pass, the mortgagee is entitled to reasonable notice (in England of six months) before tender or payment of such money is maie, except when the mortgage is equitable; or the mortgagee has himself begun any action to recover the money; he can in that case get interest only up to date of payment.[1] Again, the mortgage debt is one and indivisible, and therefore a person interested in a share only of the mortgaged property cannot redeem his own share only on payment of the proportionate part of the amount remaining due on the mortgage, except where a mortgagee or all mortgagees has or have acquired in whole or in part the share of a mortgagor.

The doctrine of "clogging the equity"—It is a primary rule that there shall be no *clogs on redemption*, i.e., the equity of redemption cannot be fettered. A court of equity will not enforce any agreement which operates to prevent redemption, or is unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage—*see:*

(1) *Salt* v. *Marquis of Northampton*, (1892) A. C. 1

(2) *Stanley* v. *Wilde*, (1899) 2 Ch. 474.

(3) *Rice* v. *Noakes*, (1902) A. C. 24.

Thus a mortgagee cannot stipulate to be allowed to remain in possession as a perpetual tenant at a fixed rent even after redemption.[2] Again, the stipulation that the mortgagor alone shall be entitled to redeem is invalid[3]; similarly, a condition that redemption shall be postponed until all debts due from the mortgagor to the mortgagee are paid off is void,[4] so also a condition that redemption

1 West v. Durose, (1900) Ch. 337.

2 Mahomed v. Jijbhai, 9 Bom. 524.

3 Trimbak v. Sakharam, 16 Bom. 599; Sayad Abdul, 20 Bom. 677.

4 Rama v. Martand, 9 Bom. 236; Yeshwant v. Vithal, 12 Bom. 237.

shall not be had till another existing debt or further advances are paid off, is invalid.[1] These are all illustrations of the maxim "Once a mortgage always a mortgage," i.e., no clog or fetters can be put upon the equity of redemption. The doctrine also applies to equitable mortgages—*see*:

(1) *Kreglinger* v. *New Pantagonia*, etc., (1914) A. C. 25.

(2) *De Beers Consolidated Mines, Ltd.*, v. *British South Africa Co.*, (1912) A. C. 52.

Devolution of the equity of redemption—If the land is of gravel kind tenure, the equity of redemption (in English law) descends in gravel kind; if the land be borough English, the youngest son is entitled. In case of copyhold, it descends according to the customary rules of descent; in case of freehold, according to the ordinary canons of descent modified by Statute. (*Snell*.)

Note.—(*i*) Section 60 does not bar a suit for redemption even though mortgage-money has not been paid or tendered.

(*ii*) If a decree for redemption is once passed, but is not executed, subsequent suit for redemption of the same mortgage cannot lie.

(*iii*) The omission in a redemption decree of any provision for foreclosure or sale in default of payment on due date, does not deprive the mortgagee of the relief provided for by s. 93.

(*iv*) Court can enlarge time of payment in a redemption suit even after the failure to pay on the day fixed.

(*v*) Upon redemption, if the mortgagee cannot hand over the title-deeds to the mortgagor—if they are lost—he would be liable in damages.

1 Rajmal v. Shivaji, 27 Bom. 154; Sheoshankar, 26 All. 559.

(*vi*) It is open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee.[1]

(*vii*) When a person indebted to another passes a mortgage-deed for a new advance and the old loan, stipulating that he will not redeem a part, i.e., new loan only, without redeeming the old one—there is no clog.[2]

(*viii*) There is no clog if the right of pre-emption is given to the mortgagee in case the mortgagor proceeds to sell the mortgaged property,[3] nor if the mortgagor of a public-house agrees to take all the beer consumed therein from the mortgagee.[4]

(*ix*) *Noakes* v. *Rice*,[5] *Jarrah Timber* v. *Samuel*.[6] In the first of these cases a covenant by the mortgagor not to sell in the public-house any malt liquors—except those purchased from the mortgagee—during the continuance of the mortgage, whether any money may or may not be owing on the mortgage, was held to be a clog.

Who can redeem—Primarily, of course, it is the mortgagor that can redeem; but the equity of redemption being an estate in the land, all persons entitled to any estate or interest in it are entitled to redeem, e. g., an heir, devisee, purchaser, lessee, judgment-creditor, even tenant for life. A mortgage redeemed by a tenant for life is kept alive for his own benefit. A reversioner cannot redeem against the wishes of the prior life tenant. Section 91 of the

1 Kanayalal, 27 Bom. 297.
2 Hari v. Vishnu, 28 Bom 349.
3 Orbey v. Trig, 9 Mad. 2.
4 Biggs v. Hadialal, (1898) 2 Ch. 307.
5 (1902) A. C. 24.
6 (1904) A. C. 323.

Transfer of Property Act enumerates some of the persons besides the mortgagor who can redeem (under conditions mentioned in s. 60 of the Act).

Indian law.—(1) Any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property.

(2) Any person having an interest in or charge upon the right to redeem the property (i e., upon the equity of redemption).

(3) Any surety for the payment of the mortgage debt or any part thereof.

(4) A creditor of the mortgagor who has in a suit for administration of his estate obtained a decree for sale of the mortgaged property.

Redeem up and foreclose down and the doctrine of subrogation.—This is generally as regards persons entitled to redeem. Clause (1) above includes the case of subsequent mortgagees of property paying up the amount due to prior encumbrances; for such mortgagees, the general governing maxim is " Redeem up and foreclose down"; and this maxim is the basis of ss. 92 and 94 of the Transfer of Property Act; which run thus:—

> " Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The right conferred by this section is called the **right of subrogation.** The right of subrogation cannot be claimed unless the mortgage in respect of which the right is claimed has been redeemed in full. "

S. 94 embodies the conception of "foreclosing down." It provides that where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

As a matter of course, the prior mortgagee, who is paid up by the subsequent mortgagee, must give a receipt to him and, if he does not, the mortgagee offering to pay can bring a redemption suit. The simplest way to explain the maxim is that to get full rights in the property, you can and must redeem all that are prior to you—all who are up above you—in the line of encumbrancers; and you can foreclose only those who are interested in the property subsequently to you, i, e., down in the line. All must be parties to the action.

Limitation for redemption by a co-mortgagor—The difficulty, however, often arises in the case of co-sharers or co-mortgagors, as to what period of limitation applies in their case. It has been held by the Bomboy High Court in *Ramchandra* v. *Dadashivi*[1] that one of several co-mortgagors can redeem; but he must redeem the whole estate and not a part, because the mortgage debt is one and indivisible. If one of them redeems, the others can redeem their shares from the former within 60 years allowed by Article 148 of the Limitation Act according to the Allahabad view, and 12 years according to Bombay.[2] The same rule operates in the case of mortgage of joint family property.[3]

Partial redemption—Section 60 of the Transfer of Property Act, while giving to the mortgagor the right to redeem expressly provides that " nothing in this section shall entitle a person interested in a share only of the

1 11 Bom. 422.
2 Vasudev v, Balaji, 26 Bom. 503.
3 Naro v. Vithal, 10 Bom. 648.

mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage except only where a mortgagee or, if there are more mortgagees than one, all such mortgagees has or have acquired in whole or in part the share of a mortgagor." Section 67 which speaks of the right of foreclosure also says that nothing in that section shall authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have with the consent of the mortgagor severed their interest under the mortgage. These two bare statements of law are based upon the principle that the mortgage debt is one and indivisible, and that there can be no splitting it up piecemeal. A person entitled to redeem must either redeem the whole or not at all; of course, where there is a distinct severance of the interests of the mortgagors with the consent of the mortgagee, there is no hardship to the mortgagee and part redemption is allowed; such a case, though obviously striking as an exception, is but one deduced from the rule itself.[1] Another exception to the general rule is where the equity of redemption in a portion of the property mortgaged becomes vested in the mortgagee himself; in such a case the mortgagee himself breaks the mortgage security, and the mortgagor or his representatives become entitled to redeem on payment of a proportionate part of the debt charged on the property; but it is not so when the equity of redemption is vested in one of several mortgagees; in such a case the whole debt must be paid. As to the applicability of this proviso to s. 60 there is a difference of opinion, the Bombay High Court holding that it applies only when the mortgagors are owners of different parcels and not when they are joint tenants or tenants in common; the Allahabad High Court is of opinion that it applies in all cases without such distinction.

1 Laxman v. Madhab, 14 Bom. 186.

Though in case where security is split up by the mortgagee himself by acquiring a part of the mortgaged property, one of several co-mortgagors can redeem his own share on payment of a proportionate amount of the mortgage money, the mortgagee is not bound to allow him to redeem the shares on others in which he is not interested.[1]

These remarks hold good for foreclosure also. The mortgagee can sever their interests only with the consent of the mortgagor ; in the absence of such a consent a person entitled to a part of the mortgage-money cannot bring a suit for foreclosure of the corresponding part of the security ; but such a suit will be allowed if two joint mortgagees acquire the equity of redemption ; the other can then foreclose for his share.

Summary—The exceptions to the general rule that a mortgagee's security shall not be split up are summed up by the Bombay High Court in *Narayan* v. *Ganpat*[2] thus :—

" There can be a rateable distribution of the debt—

(*a*) When the mortgagee does not insist on keeping the security entire.

(*b*) When the original contract itself recites that the mortgagors have merely joined in mortgaging their separate shares.

(*c*) When the mortgagee has himself split up the security. "

Prob.—A mortgaged by a single instrument his two houses to B for Rs. 1,000. K purchased at a court sale A's interest in one of the houses and sold it to M, the plaintiff. M sued to redeem the house with a prayer that B be ordered to convey it to him on payment of a proportion to its value;

1 Kallankhan, 28 All. 155.

2 21 Bom 620.

the lower court decrees the claim. B intending to appeal against this decision comes to you for advice.

A.—Section 60, clause (4) is clear. It is the inherent right of the mortgagee that his security shall not be broken up. M in this case becomes by his purchase the owner of a part of the equity of redemption. M cannot claim to redeem his share only; if at all, he must redeem the whole and assume the position of a mortgagee in respect to the original mortgagor A, whom he may compel to redeem the other house for which he has paid up B. But in no case can M get redemption of his part only. The lower court is wrong in its decision. B would succeed in his appeal.

Covenants implied in a mortgage—Section 65 mentions some of the covenants which are implied on the part of the mortgagor (in the absence of a contract to the contrary):

(1) That the interest which the mortgagor professes to transfer to the mortgagee subsists and that the mortgagor has power to transfer the same. (See s. 68 as to the remedy of the mortgagee on breach of the covenant.)

(2) That the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend the mortgagor's title thereto.

(3) That the mortgagor will defend, or if the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property; this does not imply that all public charges before the commencement of the mortgage have been paid. This covenant ends as soon as the equity of redemption is transferred to a third person.[1]

1 Balkrishna v. Vishvanath, 19 Bom. 528.

(4) And where the mortgaged property is a lease, that the rent payable under the lease, the conditions contained therein, and the contract binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or if the lease be renewed, perform the conditions contained therein and observe the contracts binding on the lessee; and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said contracts; it must be noted that the mortgagee of a leasehold does not, by merely accepting a mortgage of such interests, make himself liable to perform the covenants in the lease.

(5) And where the mortgage is a second or subsequent encumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior encumbrance as and when it becomes due and will at the proper time discharge the principal money due on such prior encumbrance.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time, vested, i.e., the benefit of these covenants runs with the land.[1]

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1 John v. Holmes, (1900) 1 Ch. 188.

This section is based on the English Conveyancing Act of 1881.

Power of mortgagee of sale out of Court (s. 69).—A mortgagee is, on default of the mortgagor in paying the money due, entitled (under s. 69, T. P. Act) to sell the mortgaged property out of court.

When can be exercised—(1) When the mortgage is an English mortgage and neither the mortgagor nor the mortgagee is a Hindu, Mahomedan or Bhudhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council.

(2) Where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Secretary of State for India in Council.

(3) Where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, suituate within the town of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab, or any other town or area which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf.

Conditions precedent—But this power cannot be exercised unless and until—

(*i*) Notice in writing requiring payment of the principal has been served on the mortgagor and there has been default in the payment for 3 months after service.

(*ii*) Some interest under the mortgage amounting at least to Rs. 500 is in arrear and unpaid for 3 months after becoming due.

This power of sale is nothing but an authority to defeat the equity of redemption, and it does not affect the ordinary right of the mortgagee to foreclose the mortgage.

Effect of irregularities.—If a sale is legally made (in the exercise of the power) the purchaser's title becomes absolute; it cannot be impeached on the ground that notice was not given or that the power was irregularly exercised or that no case for sale had arisen; at the most the person aggrieved can claim damages from the person exercising the power. The money realized is, after the discharge of prior encumbrances, if any, to be held by him (mortgagee) in trust to be applied thus:—(1) in payment of costs, charges and expenses incurred; (2) discharge of the mortgage-money and costs; (3) and the residue shall go to the person entitled to the mortgaged property.

Selling before time fixed, or without proper notice, or when nothing was due, or making misstatement in the particulars of the sale, is improper and irregular, and damages would therefore have to be paid.[1] As regards appropriation of purchase-money, it is clear that the mortgagee shall be answerable if he makes a payment to the wrong person.

If there is a surplus and he cannot ascertain to whom it is payable, he is bound to set it apart in such a way as to be fruitful for the benefit of the person who may turn out to be entitled to it.[2] If there is a deficiency, the mortgagee can, of course, sue the mortgagor for the same. Mortgagee should not buy himself.[3] He cannot sell without

1 Tamlin v. Luce, 43 Ch. D. 191.
2 Abdul v. Nurmahomed, 16 Bom. 141.
3 Hodgson, (1903) 2 Ch. 647.

the leave of the court if a decree *nisi* for foreclosure is already made.[1]

When a mortgagee may sue the mortgagor personally for the mortgage-money—Section 68 of the Transfer of Property Act provides for cases when the mortgagee can sue the mortgagor personally for the mortgage-money. He can:—

(1) Where the mortgagor binds himself to repay the same; such a personal covenant is implied in a simple mortgage and in an English mortgage; in other cases, e.g., usufructuary mortgage or that by conditional sale, no such covenant is implied though it may be put in if the parties so desire.[2] It must be noted that this personal liability will subsist even if the mortgagor has assigned his equity of redemption to a third person, and the assignee by merely taking the assignment does not become personally liable.

(2) Where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor. If the title of the mortgagor is defective, the mortgagee can bring an action for breach of the covenant for title; also where a previous mortgage has been suppressed. A person taking a precarious security, e. g., a sub-mortgage, cannot claim the benefit of this provision. A breach of any of the obligations mentioned in s. 65 would be a default within the meaning of this section.[3] It is quite obvious that if the security is lost owing to the default of the mortgagee, he cannot sue the mortgagor personally.[4]

1 Stevens, (1903) I Ch. 857; Egmore Benefit Society v.K. Aburupamal. A. I. R. 1943 Mad. 301.

2 Balabhai. (1895) Bom. P. J. 310.

3 Gopalasami v. Arunchella, 15 Mad, 334.

4 Jamnadas V. ai Muli, Bom. P. J. (1879), p. 089.

A mortgagee can sue to recover mortgage-money before the expiry of the period fixed if he finds that the mortgaged property is one over which he has no right.[1]

So also if he has fraudulently concealed the fact of a decree for sale on a prior mortgage outstanding against the mortgaged property.

(3) Where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any other person. Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially disturbed or the security is rendered insufficient, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for the debt, and, if the mortgagor fails so to do, may sue him for the mortgage money. This clause protects the mortgagee against his possession being invaded by a person under a lawful title; but he cannot sue a mortgagor personally if his possession is *unlawfully* disturbed by a stranger.

Provided that, in the case referred to in clause (1) a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money, and where a suit is brought under (1) and (3) the court may, at its discretion, stay all proceedings therein until the mortgageé has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and if necessary retransfers the mortgaged property.

1 Vencatrao, 26 Bom, 241.

Note.—S. 68 provides for a personal remedy only and does not give the mortgagee a right to sue for the sale of the property (at any rate where there is a covenant to pay); so this section cannot supersede s. 67 which prescribes the remedies of the different kinds of mortgagees. For instance in the case of a usufructuary mortgage a mere covenant to repay the mortgage-money without any hypothecation does not change the character of the mortgage.[1] Nor is a mortgagee bound to sue for the remdy given by this section. He may even pursue all at the same time, e. g., proceed personally for the debt and obtain a money decree and also proceed against the property by way of foreclosure or sale.

Prob.—X borrowed money from Y on the security of a mortgage of real estate and the collateral security of a bond. On default by X, Y filed a suit for foreclosure in which he obtained a deree, but finding that the value of the estate was not sufficient to satisfy the debt he also filed a suit upon the bond. Is Y's suit on the bond barred by his previous suit on the mortgage? What rights accrue to X if he brings a suit on the collateral security?

A.—As a general rule, the mortgagee can pursue all his remedies at the same time but there are limitations to this. If full payment is had on the bond, there is no necessity of foreclosure for the mortgage is redeemed; but if the full payment is not had on the bond or covenant, the mortgagee can file a foreclosure suit for the balance. But if foreclosure suit is brought first and the debt is not fully satisfied by the decree in such a suit, though he can bring a suit on the bond or covenant, the peculiarity is that the mortgagor gets a fresh right to redeem, i. e., the foreclosure is opened up. In this case then Y's suit on the bond is not barred by his previous suit on the mortgage. But Y's bringing such a suit

1 Ramlal v. Mt Genda 1942 I. L R. All. 368

would open up the foreclosure and give a right to redeem the whole.[1]

Prob—A mortgaged his house to B in 1874. In 1883 he obtained a further advance from B on the same property. In 1887 B sued on the first mortgage and on A's default in paying the debt exercised his right of foreclosure. B now sues on the second mortgage of 1883 to recover the debt personally from A. Will he succeed?

A.—Section 67, Transfer of Property Act. By foreclosure the entire debt is deemed to be satisfied. He cannot, therefore, recover from the mortgagor personally; if he brings the suit, foreclosure will be opened up.[2]

CHAPTER XVIII.

The rights and liabilities of a mortgagee in possession. —Rules as to priority.—When priority is lost.—Effect of registration.

Rights of a mortgagee—Under s. 72 of the Transfer of Property Act, a mortgagee may spend money as is necessary—

(*a*) for the preservation of the mortgaged property from destruction, forfeiture or sale;

(*b*) for supporting the mortgagor's title to the property, or

(*c*) for making his own title thereto good as against the mortgagor. The mortgagee cannot claim costs of maintaining his title to the security against a

1 Palmer v. Hendric, 27 Beav. 3'1.
2 Bapu v. Ramji, 11 Bom. 172.

third party where the result of the litigation cannot in any way affect the rights of persons interested in the equity of redemption[1];

(*d*) when the mortgaged property is a renewable leasehold, for the renewal of the lease—these are very rare in India and hence such cases do not often arise—he cannot compel the mortgagor to advance money for renewal ; he can if he has spent his own money, add to the mortgage-amount[2] ;

(*e*) and in the absence of a contract to the contrary the mortgagee can add such money to the principal money, at the rate of interest payable on the principle and where no such interest is fixed at the rate of 9 per cent, per annum.

Provided that the expenditure of money by the mortgagee under clause (*a*) or (*b*) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to preserve the property or to support the title.

Under s. 76 (*h*), the mortgagee cannot add the expenses incurred for the management of the property and the collection of rents and profits to the mortgage-money, but he is allowed to deduct these expenses in the account of his receipts.

Insurance—He can, if the property is insurable, insure and keep insured against loss or damage by fire the whole or part of the property. The premia paid are a charge on the said property and have a priority to be paid along with principal and interest, and with interest at the same rate. The amount of such insurance should not exceed the amount specified in this behalf in the moragage-deed, or if

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1 National Provincial Bank, 31 Ch. 596.
2 Damodar v. Vamanrao, 9 Bom. 437.

not specified, it should not exceed two-thirds of the amount that would be required in case of total destruction to reinstate the property insured. No such insurance is necessary when the mortgagor himself has insured the same property to that amount.

Possession—A mortgagee when he has once entered into possession of the mortgaged property cannot at pleasure give up the possession again although he may be relieved by means of a receiver being appointed.[1]

It is not in the mortgagee's interest to dispossess a mortgagor.[2]

Assignee of a mortgage—Every assignee of a mortgage who takes his assignment without the privity of the mortgagor, takes it subject to the state of accounts between the mortgagor and the original mortgagee as existing at the date of the assignment.[3] If a mortgagee in possession assigns over the mortgage to another he will be liable to account for the profits received subsequent to the assignment, unless where the same is with the consent of the assignor or under the direction of the court.

Liabilities of a mortgagee in possession (s. 76).—A mortgagee taking possession of the mortgaged property during the continuance of the mortgage is (under s. 76, T. P. Act,) under the following liabilities:—

(1) He must *manage the property* as a person of ordinary prudence would manage it if it were his own. A mortgagee in possession is not a trustee for the mortgagor, but he has to exercise the discretion of a prudent man; he cannot pull down building, cut down trees, allow the leases

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1 Prytarch, 42 Ch. D. 590; Gloucester Bank, (1895) 1 Ch. 659.

2 In re Pope, 17 Q. B. D. 749.

3 Turner v. Smith, (1901) 2 Ch. 160.

to be forfeited by non-performance of the conditions in the lease. He is not bound to make the most of the property of the mortgagor; he can be held liable only when his default or negligence is such as would partly amount to a breach of trust. As to when a mortgagee can be said to be in possession is doubtful; merely being in receipt of rents and profits is not sufficient; the *test* is "whether the mortgagee has taken out of the hands of the mortgagor the power and duty of managing the estate and dealing with the tenants."

(2) He must use his best endeavours to *collect rents* and profits of the mortgaged property; this is in accordance with the English law on the point. As held in *Parkinson* v. *Hambury*,[1] he has to account not only for what has been actually received but also for what he might have received but for his wilful default, e. g., if he turns out or refuses to accept a good tenant, or lets at less than is offered he is liable for the loss; he is liable also for the gross negligence of his agent.[2] But a mortgagee need not embark into doubtful litigation. A mortgagee is, however, ordinarily liable for the rents at the rate shown in the rent-roll. A mortgagee cultivating lands himself is liable only for such profits as would have been received if lands were let out; but in Bombay a mortgagee who planted trees on the mortgaged land was allowed merely a fair interest and had to account for the net profits.[3]

(3) He must, out of the income of the property, *pay the Government revenue,* all other charges

1 L. R. 2 H. L. 1.
2 Union Bank v. Ingram, 16 Ch. D. 53.
3 Prabhakar v. Pandurang, 12 B. B. C. R. 83.

of a public nature accruing due during such possession, and any arrears of rent on default of payment of which the property may be summarily sold. This being a paramount charge, must be paid up at once; if the mortgagor who is not in possession pays up, he is entitled to credit for the amount in the mortgage account and to charge interest.

(4) He must make such necessary *repairs* of the property as he can pay for out of surplus rents, i. e., the rents and profits thereof, after deducting from such rents and profits the payments in clause (3), and interest on the principal money. A mortgagee must make necessary repairs, but only if there is a surplus ; else not. He is under no liability to make a fresh outlay thereafter. The old law that he was like a trustee bound to repairs in any case, is repealed by this new section.[1] If a mortgagee in possession is to receive the whole profits in lieu of interest, it follows that he is under no obligation to make repairs. If there is surplus and he does not repair he would be liable for consequences of his neglect.[2]

(5) He must not commit any act which is destructive or permanently injurious to the property. He is bound not only to abstain from committing waste but also to restrain others from doing so.[3] In England it is only a mortgagee whose security is deficient that can open new mines or fell timber.[4] If a mortgagee unnecessarily and without

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1 Jogendra v. Rai Narain, 9 W. R. 488 ; Godfrey v. Wilson, 3 Atk. 518.

2 Shivadri v. Jeru, 15 Mad, 290.

3 Lachmi v. Jetmal, 16 All, 386 ; Amrit v. Lalla, P. J., (1898) p. 373.

4 Millet. 31 Beav. 470

the consent of the mortgagor pulls down the old buildings and erects new ones in their place, he is liable for any loss of rent thereby caused.[1]

(6) Where he has *insured* the whole or part of the property against loss or damage by fire, he must, in the case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary in reinstating the property, or if the mortgagor so directs, in reduction or discharge of the mortgage-money.

(7) He must keep clear, full and accurate *accounts* of all sums received and spent by him as a mortgagee, and at any time during the continuance of the mortgage give to the mortgagor at his request and cost, true copies of such accounts and of the vouchers by which they are supported. This is a duty analogus to that of a trustee under s. 19 of the Indian Trusts Act.[2]

(8) His receipts from the mortgaged property or where such property is personally occupied by him, a fair occupation rent in respect thereof shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and other expenses, mentioned in clauses (3) and (4), and interest thereon, be debited against him in reduction of the amount, if any, from time to time due to him on account of interest and so far as such receipts exceed any interest due in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor.

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1 Sandon, 6 Beav. 246.

2 Golukchandra 5 W. R. 271.

(9) The mortgagee must, on a tender made by the mortgagor of the amount due, account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of court as the case may be, and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.

Liability of mortgagee for failure of performance of duties—He may, when accounts are taken in pursuance of the decree passed, be debited with the loss, if any, occasioned by such failure. Clauses (2), (4), (7), (8) do not apply to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and a defined portion of the principal.

Disabilities of a mortgagee—A mortgagee cannot take a lease from the mortgagor nor can he purchase the mortgaged property from the mortgagor for himself under a power of sale contained in the deed.[1]

Prob—Will a court charge A, a mortgagee in possession of property, in any of the following cases:—

(*a*) A having entered into possession as a mortgagee had a receiver appointed whereby the estate was put to a loss.

(*b*) After A entered into possession the outturn from the land fell by Rs. 100 a year.

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1 Ex parte Buxton, 15 Ch. D. 289 ; Ashwood, (1899) A. C. 150.

(*c*) A failed to pay the Government revenue, for which default the property was put up for sale and bought by A himself in his own name.

(*d*) A failed to keep proper accounts.

(*e*) A, instead of letting the land to tenants, cultivated it himself ?

A.—(*a*) Once having entered into possession it is not open to him to surrender possession of the property to serve his convenience or have a receiver appointed; he must manage it as a man of ordinary prudence would do if the property were his own.[1]

(*b*) He cannot be, because he is not an assurer of the continuation of the same rate of profit which the mortgagor could raise ; if the outturn is less owing to change of management, A cannot be made to suffer.[2]

(*c*) A would not be allowed to retain the property as his own ; though the property is formally sold, the mortgagor's right to redemption would be decreed as subsisting.[3]

(*d*) The omission would create a presumption against him *in odium spoliatoris* ; A would not be allowed his costs of the suit.

(*e*) A would be responsible for the profits that would have been realized had the property been let to tenants. A cannot be made to account for all the profits realized by him.[4]

Priority of mortgages—The following provisions of the Transfer of Property Act bear on this point:—

(S. 48.) Where a person purports to create by transfer at different times, rights in or over the same immovable

1 In re Prytarch, 42 Ch. D, 600

2 Mukund Lal v. Keshavsingh, 12 M. I A 193.

3 Kalapa v. Shivaya, 20 Bom. 493.

4 Raghunath v. Girdhari, 7 W. R. 244.

property and such rights cannot all exist or be exercised to their full extent together, each later-created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

This is as regards priority between legal mortgages and not equitable, and hence is not very material, for it seems to be a paraphrase of the maxim "*Qui prior est tempore potior est jure*," but the rule admits of certain exceptions as under:—

(S. 78.) Where through the fraud,[1] misrepresentation or gross neglect[2] of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

This section lays down a general rule to determine priorities between all kinds of mortgages; certain specific rules can be deduced from cases decided in the light of this principle. The first of these is the case of *Northern counties Insurance Co. v. Whipp*[3] where it was held that *a legal mortgagee will be postponed to a subsequent equitable mortgagee:—*

(1) When he has assisted in or connived at a fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate.

(2) When he has constituted the mortgagor or his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate.

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1 Radcliffe, L, R, 6, Ch. A. C, 852,

2 Oliver v. Henton, (1899) 2 Ch. 455.

3 26 Ch, 482.

Test—Is there any *positive act* of the first mortgagee which conduces directly to the deception practised by the mortgagor upon the subsequent encumbrancer.

There must be something fraudulent—or recklessly negligent, blind turning away from plain facts—that can deprive the legal mortgagee of his priority ; mere carelessness or want of prudence on his part is not sufficient to postpone him to a subsequent equitabla mortgagee.[1] As to what would amount to gross negligence under the section, it is difficult to determine ; ordinarily " gross negligence is said to consist in any act or omission by the prior mortgagee which enables the mortgagor to deal with the property as if it was unencumbered." It is not necessary for the mortgagee to disclose his charge to every intending encumbrancer, but he is at least under this obligation, that he will not do anything intentionally misleading ; the law on the point is very briefly summed up by *Turner*, J., in *Salamat Ali* v. *Budhu*,[2] thus: "It is of the essence of constructive fraud that the person sought to be charged therewith should be proved to have concurred or co-operated in some deceit or to have been guilty of gross negligence; it is not enough to show that he, being aware of the other person dealing with the property, over which he has a charge, kept silence and stood by." It is not necessary for a mortgagee to volunteer information, but if inquiry is made of him expressly and then he remains silent, he would be charged with constructive fraud ; for example, a *mere attestation of the execution of a mortgage-deed* by a prior mortgagee is not sufficient to create an estoppel against the attesting person, for he cannot necessarily be presumed to have been aware of the contents of the deed ; but if such knowledge is brought home to him and he has kept silence, and if the subsequent mortgagee is thereby deceived, the

1 Briggs v. Jones, L. R. 10 Eq, 92; Dixon v. Watch, (1900) Ch. 734.

2 1 All. 303.

prior mortgagee will be deprived of his property. It is also lost by conduct as the prior mortgagee indicating gross neglect on his part; thus if he leaves the title-deeds with the mortgagor for a number of years after his mortgage, and is not able to give a reasonable explanation of his conduct in so doing, he will be postponed to any subsequent mortgagee who advances money on the security of those deeds. This consequence follows on the general principle of equity, viz., that "A person, however innocent, putting it in the power of another to deceive and raise money, must take the consequences."[1]

It may be noted that the above rule of estoppel by negligence applies only if the alleged negligence is a breach of some duty on the part of the prior mortgagee; the gross neglect must be in the same transaction and must have been the proximate cause of the change in the position of the subsequent encumbrancer[2]; thus if title-deeds were stolen or a sub-mortgage was created by the mortgagee or if he delivered the title-deeds to the mortgagor on some reasonable representation made by him (who was thereby enabled to sell the property as unencumbered), the prior mortgagee, with all that, will be able to enforce his charge against the purchaser. A person taking a mortgage must make all necessary inquiries as to the title-deeds, and if he is given a false answer he is not to be made to suffer though he must not too readily accept the statements of the mortgagor; if he fails to make inquiry, he will lose his priority.

As between *equitable mortgagees*, too, the general rule is that they rank according to their priorities of time. Much of what is said above applies. Priority is determined on

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1 Briggs v. Jones, L. R. 10 Eq. 92; Shanmull v. Madras Building Co., 15 Mad. 268; Joshi, 2 Bom. 650; Dhondo v. Ramji, 20 Bom. 290; Ramchandra v. Jairam, 22 Bom. 686; Balmukundas v. Moti, 18 Bom 444.

2 Lloyds Bank v. P. E. Gazdar & Co. (1929) 56 Cal. 868.

a consideration of the fact as to whether the subsequent encumbrancer had notice of the prior encumbrance. The principle is that as between two innocent purchasers, that one must suffer who has permitted the fraud to be committed.[1] And so an equitable mortgagee who parts with the title-deeds and thereby enables the depositor to make another equitable mortgage will, by reason of his laches in not getting back the title-deeds from the person to whom he delivered them, be postponed to such subsequent mortgagee; but then the mere possession of the title-deeds by a second mortgagee does not necessarily give him priority though he may be an encumbrancer for value without notice; it must, in order to give him priority, be accompanied with some positive act or default on the part of the first mortgagee.[2]

A prior equitable mortgagee has priority over subsequent purchasers or mortgagees of the legal estate with notice, but not if the latter has no notice of the prior equitable encumbrance; the maxim "Equities being equal, the law must prevail" governs such a case; as said above, the subsequent legal mortgagee must make due inquiries as to the title-deeds; his failure to do so will deprive him of his right to priority for he is then presumptively fixed with notice of a prior equitable mortgage.[3]

In England, s. 97 of the Law of Property Act provides that every mortgage affecting a legal estate in land made after 1925, whether legal or equitable (not being a mortgage protected by the deposit of documents relating to the legal estate affected), is to rank according to its date of registration as a land charge pursuant to s. 10 of the Land Charges Act, 1925. If the mortgagor has only an equitable interest, the mortgagee in order to preserve his priority

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1 Rice v. Rice, 1 W. T. P. C.

2 Ferrant v. Yorkshire Bank, 43 Ch D. 182.

3 Hewit v. Lossemore, 9 Hare 466.

must give written notice under s. 137 of the Law of Property Act, 1925.

Solicitor's negligence—A solicitor is liable for negligence in not discovering a mesne or prior mortgage.[1] If he takes a cheque in payment, it is negligence in him to part with the deeds before the cheque is cashed.[2]

Prob—A mortgaged land to B by a mortgage duly registered. A subsequently got back the title-deeds and handed them to C to whom he mortgaged the same property. B sued C for a declaration of priority. Will he be entitled to it ?

A.—The law as to priority (s. 78, T. P. Act) is, in short, this : When both encumbrances are legal or equitable, i. e., both have equal equities, *qui prior est tempore potior est jure* (the first in time prevails); where equities are equal, i. e., when one has a legal estate and the other equitable, but they are equal in other respects, the law will prevail; but if a subsequent legal encumbrancer enters into the transaction with notice of the prior equitable estate, the latter one will not prevail as against the prior equitable estate. The case of *Northern Counties Assurance Co.* v. *Whipp* applies ; B is not much to blame for he gave back the title-deeds ; inasmuch as his mortgage being registered operates as notice to subsequent encumbrancers who are expected to use due diligence to make an inspection at the Registrar's Office ; otherwise they would be fixed with constructive notice of the registered mortgagee's title and take subject to his rights. B would lose his priority only if it can be successfully proved that he parted with the title-deeds to enable A to commit fraud with that knowledge and intention.[3] On these facts, it was held by the Bombay High Court

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1 In re Dangar's Trusts, 41 Ch 178.

2 Lloyds bank, Ltd, v. P. E. Gazdar & Co (1929) 58 Cal. 868.

3 Pape v. Westmacott, (1894) 1 Q. B. 272.

in *Balmukund* v. *Moti* that the registration of B's mortgage was notice to C.

Prob.—A borrowed money to a large amount of his wife B, who was executrix of her former husband, and being pressed by B to execute some security for the same, consented to give a legal mortgage on certain property of his ; C. a solicitor, was employed to prepare the mortgage and he asked A for the title-deeds, who replied that they were at his place in another district; whereupon the mortgage was executed without their production. It afterwards turned out that the deeds were deposited by A with a bank by way of equitable mortgage; an action is brought by the bank for a declaration of the priority of its mortgage. Decide the claims of B and the bank.

A.—In this case the competition is between the legal mortgagee B and the equitable mortgagee the bank; the title-deeds being with the bank, the absence would amount to a constructive notice of the prior equitable mortgage, but such a presumption is rebutted because C, the solicitor of B, is proved to have made inquiries for the deeds, and since a reasonable excuse had been given for their non-production, no notice of the bank's prior mortgage can be fixed on B; B the legal mortgagee is therefore entitled to a priority and not the bank; the result would indeed have been different if B's solicitor had designedly abstained from making inquiry as to the title-deeds.[1]

Prob.—A, having an equitable estate in certain property at Surat, mortgages it to B and afterwards to C, and subsequently to D who has notice of C's mortgage. D registers his mortgage before C and afterwards assigns it to E who has no notice of C's mortgage. C sues to redeem B and to establish his priority over D and E. Decide the suit.

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1 Agra Bank v. Barry, L. R. 7 Ir. A. 35; Leneve v. Leneve, 2 W. & T. Leading Cases.

A.—D takes the mortgage with notice of C's mortgage; and as a rule of law, deeds operate from the date of execution and not from the date of registration; therefore D's getting registration before C will not avail him if he has notice of C's mortgage; and D taking with notice of C's prior mortgage cannot, by assignment to another (E) who has no notice, give E a better title than he himself has [1]

Prob.—A executes a mortgage in favour of X and acknowledges in the deed having received Rs, 5,000 from X; but in fact he received Rs. 2,500 only from him; X transfers the mortgage to Y who pays X Rs. 2,500 and has no notice of A having received Rs. 2,500 only from X. A afterwards sues Y to redeem on payment of Rs, 2,500 only. Will A succeed?

A.—On the principle of the English case of *Rice* v. *Rice*,[2] A can redeem on payment of Rs. 5,000 only; he is himself to blame for giving a receipt for Rs. 5,000. Y, an innocent transferee, is not to be defeated. Further, A should have kept the mortgaged property or title-deeds in his own possession that a person dealing with it could have known the real state of affairs. It is a rule of equity that as between two innocent parties, that one must suffer who has allowed the fraud to be committed.

Effect of registration—It is an established rule of law as laid down in a leading English case,[3] that a person purchasing an estate, though for valuable consideration, after notice of a prior equitable right, cannot, by merely getting in the legal estate, defeat the prior equitable one; he is in the eye of the law a trustee on behalf of such a prior encumbrancer. In India, registration has been clearly held to operate as notice to all subsequent encumbrancers of the same pro-

1 Saulava v. Narayan, 8 Bom 182; Ford v. White, 16 Beav. 120
2 2 Drew, 73.
3 Leneve v. Leneve, 2 W. & T. L. C. 184.

perty, so much so that it is held to cure the defect of want of possession.[1] By the Transfer of Property Act of 1929 an explanation is added to the definition of 'Notice' in Section 3 to the following effect:

"Where any transaction relating to immoveable property is required by Law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one Sub-District, or where the registered instrument has been registered under Sub-Section (2) of Section 30 of the Indian Registration Act, 1908, from the earliest date on which any Memorandum of such registered instrument has been filed by the Sub-Registrar within whose Sub-district any part of the property which is being acquired or of the property wherein a share or interest is being acquired is situated.

Provided that—

(1) The instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act 1908, and the rules made thereunder,

(2) The instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act and

(3) The particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under S.55 of the Act.

But sometimes the question is whether a subsequent holder by a registered instrument can have priority over the prior holder by an unregistered instrument ; of course s. 50 of

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1 Balmukund v, Moti, 4 Bom. 444; Laxman v. Dasarat, 6 Bom. 168 ; Lalubhar v. Amrat, 2 Bom. 299. See Explanation I to s. 3, Transfer of Property Act.

the Registration Act, III of 1877, says that a registered instrument relating to land, of which the registration is optional, shall take effect against all unregistered documents relating to the same property ; this general rule is, however, held by the Bombay High Court as affected by the doctrine of notice, and so where the subsequent registered holder is aware of the prior encumbrance, though unregistered, he is not entitled to priority over him on the ground of the decision in *Leneve* v. *Leneve*, that fraud should not be permitted to prevail.[1]

This is when the registration is optional ; but if it is compulsory under s. 17 of the Registration Act, there is no question ; for s. 49 of the Act does not allow such an unregistered document to be used as evidence of the right created thereby, though it can be used for collateral purposes.

CHAPTER XIX

Mortgage to secure future advances.—Doctrines of Tacking — Marshalling—Contribution—Consolidation.

Mortgages to cover future advances—The equitable principle laid down in the leading case of *Hopkinson* v. *Rolt*[2] has been of constant application in the case of advances made by a prior mortgagee after notice of the subsequent encumbrance. It was held by the majority (Lord *Cranworth* dissenting) that where a first mortgage was made to secure a sum and further advances, if the first mortgagee made a further advance with notice of a subsequent encumbrance, he will have no priority in respect of such further advances, i.e., he will not be allowed to tack his subsequent advance with his prior legal estate. S. 79 of the Transfer of Property Act departs from this rule and seems to be based on the

1 Waman v. Dhondoba, 4 Bom. 127 ; Hathising 10 Bom. 105.

2 Hopkinson V. Rolt, 9 H. L. C. 540.

dissenting judgment of Lord *Cranworth*. It says, " If a mortgage to secure future advances, the performance of an engagement, or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debts not exceeding the maximum, though made or allowed with notice of the subsequent mortgage. " It will thus be seen that in *English law* notice to the first mortgage making subsequent advances of mesne encumbrance is material, while it is not so in India, for even if that first mortgagee had notice of the mesne encumbrance he would have his priority till a defined maximum. It may, however, be noted that s. 79 speaks of a case where the maximum is specified; if it is not specified it is obvious that priority will be determined according to the date of each advance.[1]

Tacking. (s. 93).—This rule of Roman law has been in English equity applied to mortgages. This artificial rule that a mortgagee may entitle himself to priority over an encumbrance earlier in point of date, is built up on the maxim " Where equities are equal the law shall prevail. " It is when a third mortgagee who has lent money without notice of the second mortgage, takes the first encumbrance (being a legal mortgage), he is then allowed in equity to squeeze out the intermediate (second) encumbrancer and have satisfaction of his first and third mortgages before the second, i.e., he can tack (unite) his third mortgage to the first mortgage wherein he has a legal estate. The earliest case in which this doctrine was recognized is *Marsh* v. *Lee.*[2] What is necessary is that the third mortgagee must have no notice of the second encumbrance at the time of lending money; it is immaterial that he was possessed of the first legal estate *pendente lite* with notice. The main

1 Imperial Bank of India v. U Rai Gyaw Thu, (1923) 50 I. A. 283,
2 (1870) 2 Vent. 337.

rules on this point are summed up in the leading case of *Brace* v. *Duchess* of *Marlborough*.[1] But if a judgment creditor buys in the first mortgage, although a legal mortgage, he cannot tack the mortgage to his judgment for he has not lent the money on the security of the land. A judgment creditor is not a purchaser nor has he rights in the land.[2] On the other hand, if a first mortgagee, without notice and having the legal estate, lends a further sum to the mortgagor on a judgment, he can retain as against a mesne mortgagee until both his securities are satisfied.[3] Further, the rule in *Hopkinson* v. *Rolt*, noted above, applies; if further advances are made with notice of mesne encumbrance, there can be no tacking. Tacking in England applied in the case of building society mortgages as also ordinary mortgages. It must be noted that tacking required that the legal estate must be obtained by the person seeking to do it; if not the several encumbrancers must get according to priority in point of time, regard being had to the maxim "*Qui prior est tempore potior est jure.*"

Under s. 94 of the Law of Property Act, 1925, the doctrine of tacking is abolished. The Act, however, has no retrospective effect. After 1925, a mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages, whether legal or equitable—

(*a*) if an arrangement has been made with the subsequent mortgagee; or

(*b*) if he had no notice of such subsequent mortgages at the time when the further advance was made by him; or

(*c*) whether or not he had such notice as aforesaid where the mortgage imposes an obligation on him to make such further advances.

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1 2 W. & T. 112.

2 Spenser v. Pearson, 24 Beav. 266.

3 Credland v. Patter, L. R. 10 Ch. D. 8.

Indian law—Tacking as known in *English law* does not prevail in India. Section 93 of the Transfer of Property Act abolishes it by providing that "No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and except in the case provided in s. 79, no mortgagee making subsequent advance to the mortgagor whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance." It has been observed by the Bombay High Court on this point, before the Transfer of Property Act was applied to this Presidency (i.e., 1893), that the doctrine is not founded on principles of justice, and that it ought not to be held applicable in the districts; the maxim "*Qui prior est tempore potior est jure*" should govern.[1]

Prob.—A mortgaged his property to B, C, D and E successively; D had advanced his money without notice of the mortgage to C; he afterwards bought in the mortgage of B and, having come to know of C's encumbrance, called upon C to redeem the two mortgages on pain of foreclosure. Advise C.

A.—D would not succeed in India, for the doctrine of tacking is abolished in this country by s. 93 of the Transfer of Property Act, and so it is immaterial whether D had advanced his money without notice of C's prior mortgage; C would not be Called upon to redeem both the mortgages. The same would be the case in England also.

Marshalling (s. 81).—The doctrine comes into operation very frequently when the assets of deceased person have to be administered. The doctrine has been stated by Lord *Eldon* in *Aldrisch* v. *Cooper*[2] thus:—" If a creditor

1 Narayan v. Pandurang, 7 Bom. 526; Serbadh, 7 All. 568.

2 8 Ves., 382.

has two funds, the interest of debtor shall not be regarded, but the creditor having two funds shall take to that which paying him will leave another fund for another creditor." The same was held by Lord *Hardwicke* in the earlier case of *Lanoy* v. *Duke of Athol.*[1] But this doctrine has since then been qualified so that it cannot be invoked if the interest of the creditor or of third persons would be prejudicially affected, e. g.; when the first creditor has not equal rights over the two funds or if the third persons are claiming under the mortgagor for value. The first qualification was recognized in *Webb* v. *Smith*[2] in the course of the judgment of Lord Justice *Lindley*. It must be noted that this rule is wholly independent of the question of notice and that there can be no marshalling if the puisne mortgagee takes his security expressly subject to, and after payment of, the prior mortgages; in that case he is entitled only to the surplus left after the earlier mortgages are satisfied. To sum up, in order to enforce marshalling it is necessary that both the encumbrancers should be creditors of the same person and must have their demands against the funds the property of the same person, and that there should be two funds actually in existence (the one having his right against both funds, the latter against one only). It is altogether immaterial as to whether the second mortgagee had or had not notice of the first mortgage.[3]

Indian law—Section 81 of the Transfer of Property Act provides that "if the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him so far as the same will extend, but not so as to prejudice the rights

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1 2 A & K, 447.

2 30 Ch. D. 192.

3 Tidd v. Liester, 10 Hare, 197

of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties." The same rules as in English law apply in India. Marshalling was allowed in Bombay even before the T. P. Act extended to this Presidency; s. 81 has been recently amended and the words referring to notice have been omitted. Thus the doctrine of marshalling set out in the section is in consonance with the rule of English law. If the prior mortgagee exhausts the security of the second encumbrancer, such second mortgagee stands in the same position with the other security as that prior mortgagee stood. It must be noted that marshalling cannot be claimed by the attaching creditors of the mortgagor who hold mere money decrees.[1]

The doctrine of marshalling will apply only where—

(1) there is a common debtor;

(2) it does not prejudice the prior mortgagee or other encumbrancer;

(3) there is no contract to the contrary.

Prob.—A mortgaged to B certain property of the family of which he was the manager. On a partition, a part of this property fell to A's share and part to C's; afterwards A hypothecated part of his share with *D* who subsequently brought a suit and brought the part under his decree. B brought a suit against A, C and D on his mortgage, and in the decree the court of first instance directed that B should proceed first against property not included in D's mortgage; C feeling aggrieved, appeals. Will you uphold the decision of the lower court?

A.—It is a rule of equity that, in order that marshalling may be allowed, it is necessary that the parties between whom it is enforced must be creditors of the same person

1 Kristadas v. Ramkant, 6 Cal, 142.

and have demands against the property of the same person. In this case, B was a creditor of the joint family with claim against the whole property included in the mortgage, while D was creditor of A only, and the property against which D desired A to proceed first did not belong to him. The decision of the lower court is, therefore, erroneous, for A had no equity to call upon B to proceed first against the property that had fallen to C's share; such an order would have the effect of favouring A to the prejudice of C. No case for marshalling has been made out and the decision will, therefore, be reversed in appeal.[1]

Contribution (s. 82).—In order that contribution can be had, it is necessary that the several properties must be liable to one common demand. This doctrine refers to the liabilities of the owners of the encumbered estates *inter se.* This is to some extent another form of marshalling; if at all they differ in species, i. e., in form rather than in nature. " Both are adjustments between several persons, of their respective rights *inter se* in respect of a charge or claim which, affecting all of them, or properties belonging to all of them respectively, has been, or may be, enforced in a manner not unjust so far as the person enforcing is concerned. " This doctrine, i. e., contribution, involves the determination of the proportions in which two or more owners of an estate, subject to a common charge, ought to contribute to its redemption, or how one, who has paid the whole, is to be reimbursed by the other. This comes in operation more because of the principle of equity that "mortgage debt is one and indivisible." The same rule applies where properties are subject to two or more encumbrances. In short, the obligation to contribute can apply only where properties are subject to an equal burden. This right is controlled by the provisions as to marshalling, and the same has been said in s. 82 of the Transfer of Property Act.

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1 Gopal v. Saminathya, 12 Mad. 255.

Indian law—Where property subject to a mortgage belongs to two or more persons having distinct and serparate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to another to secure another debt, and the former debt is paid out of the former, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid. Nothing in this section applies to property liable under section 81 to the claim of the subsequent mortgagee.

It goes without saying that there can be no contribution when payment is made by the person primarily liable. The obligation to contribute is not a personal obligation; the person called upon to contribute may exercise his option by paying his rateable share, or by allowing it to be realized out of the property.

It is not essential to the accrual of the right of contribution that the whole of the debt, in respect of the payment of which contribution is claimed, should have been satisfied. A right to contribution arises when the payment made by the sale of his property exceeds the amount for which that property was rateably liable, and the property of that person from whom contribution is sought has, to that extent, been benefitted by being relieved of liability.[1]

1 Reghunath v. Harilal, 18 Cal. 320.

Consolidation of mortgages—This may be defined as the right of a mortgagee, having two or more securities from the same mortgagor, to refuse to allow him to redeem one without redeeming the other, i. e., to consolidate the securities. This is an equitable doctrine based on the maxim, "He who seeks equity must do equity." Since the mortgagor's right to redeem after the due date was an equitable relief, he should not be allowed to redeem one of several mortgages, unless he redeemed all.

In course of time this doctrine was extended in favour of a transferee of two mortgages on different estates though originally mortgaged to different persons. But since the Conveyancing Act of 1881, in England this doctrine does not apply ; the mortgages executed previously are, of course, left untouched. As observed in *Jenning* v. *Jordon*, the court leans against the doctrine. Even in old mortgages consolidation was not allowed (1) where there was no default on all the securities in respect of which consolidation[1] was claimed, (2) where one property had ceased to exist, (3) where one of the mortgages was created subsequently to the assignment of the equity of redemption of the other mortgage to the person seeking to redeem ; mortgages not in existence at the time when a third person acquired an interest in the equity of redemption cannot be consolidated.[2]

Indian law—Principles of English law were applied before the T. P. Act which was passed in 1882. But now s. 61 of that Act prevents consolidation except when specially provided for by the contract. Thus :—" A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem

1 Cummins v. Fletcher, 14 Ch. D. 168.
2 Harter v. Caleman, 19 Ch. D. 630.

any one such mortgage separately, or any two or more of such mortgages together." There must be an express provision in the contract allowing the mortgagee to consolidate so as to exclude the operation of s. 61 of the Transfer of Property Act.

Even now in England, as in India, a mortgagor cannot redeem one of two or more properties included in one mortgage.[1]

Tacking and consolidation distinguished.—

(1) Tacking is allowed on the maxim "When equities are equal the law prevails"; consolidation rests on the maxim "He who seeks equity must do equity."

(2) Tacking requires that legal estate must be got in by the person claiming it; consolidation does not require it.

(3) In consolidation, notice of the subsequent encumbrancer is immaterial; in tacking it would be fatal to the exercise of the right.

(4) In tacking, the main essential is throwing together debts lent on the *same* estate under the priority obtained by the legal estate having been got in. In consolidation, several debts lent on different estates are thrown together without reference to priority.

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1 Hall v. Howard, 32 Ch. L. 430.

CHAPTER XX

Deposit in court.—Parties to mortgage suits.—Foreclosure decree.—Sale for balance.—Interest post diem.—Accounts with rests.—Opening foreclosure.—Bar to sale of mortgaged property in execution of other decrees.—Charges.—Extinction of charges.—Mortgage of movables.

Deposit in court—A mortgagor or any person entitled to institute a redemption suit can, at any tine after the principal sum has become due, and before a suit for redemption is barred, deposit in court to the account of the mortgagee the amount remaining due on the mortgage. The court then issues notice to the mortgagee; the mortgagee can take that away provided he delivers the mortgage-deed and all documents in his possession or power relating to the mortgaged property in court and he accepts the amount in full discharge of the amount due to him. If the deposit is valid, the interest on the mortgage amount due ceases as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take such amount out of court and the notice has been served on the mortgagee. If the mortgage-deed so requires, reasonable notice of the tender must be given to the mortgagee and interest can cease to run only then (ss. 83, 84).

(*i*) Deposit is not proper if it is made not to the credit of the mortgagee alone but of the mortgagee and a third person jointly.[1]

(*ii*) The deposit becomes the property of the mortgagee only when he has complied with the conditions precedent to his withdrawing the money out of court.[2]

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1 Sebendra, 26 All 291.

2 Mira, 29 Mad. 232,

(*iii*) The mortgagor is not entitled to mesne profits from the date of tender if tender is premature.[1]

(*iv*) If the mortgagee is a minor, interest ceases to run till the mortgagor gets a guardian *ad litem* appointed to accept service of notice.[2]

(*v*) After the mortgagee accepts the tender he is not entitled to claim any further relief. He is bound to accept in full settlement of his claim.[3]

Preliminary decrees of Foreclosure and sale.
Foreclosure:

If the plaintiff succeeds the court shall pass a reliminary decree :—

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for principal and interest on the mortgage, the costs of the suit if any awarded to him and other costs, charges and expenses properly incurred by him up to that date in respect of the mortgage security together with interest thereon or declaring the amount so due at that date; and.

(b) directing that if the defendant pays into the court the amount found or declared due, on or before such date as the court may fix within six months from the date on which the account taken as above is confirmed or countersigned by the court or the date on which the declaration as above is made, as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses, together with subsequent interest on

1 Ramsomji, 26 Bom. 312.
2 Pandugang, 27 Bom, 631.
3 L. K. Minakshi v. Janaki, I. L. R. 1943 Mad. 205.

such sums, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him or where the plaintiff claims by derived title, by those under whom he claims, and shall also if necessary, put the defendant in possession of the property ;

(c) and that, if the payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all rights to redeem the property,

(d) and the court may, on good cause shown at any time before the final decree is passed extend the time fixed for the payment of the amount due.

(e) The preliminary decree shall provide for the adjudication of the rights and liabilities of any subsequent mortgagees or persons deriving title from or subrogated to the rights of such mortgagees, if they are joined as parties to the suit.

Sale: In the case of sale the court shall pass a decree to the effect mentioned in paras (a) and (b) of the above and shall also order that—

(a; In default of the defendant paying as therein mentioned the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part of it may be sold and the proceeds of the sale, (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance if any be paid to the defendant or other persons entitled to receive the same.

(b) In a suit for foreclosure in the case of an anomalous mortgage, the Court may at the instance of any party to the suit or of any other person interested in mortgage security or the right of redemption, pass a like deree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(c) The preliminary decree shall provide for the adjudication of the rights and liabilities of subsequent mortgagees, or person deriving title from or subrogated to the rights of such mortgagees, if they are made parties to the suit.

Final decrees of Foreclosure and sale.

(1) **Foreclosure:** Where before a final decree, the defendant makes payment into Court of all amounts due, the Court on the application of the defendant, shall pass a final

decree, ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and if necessary ordering him to retransfer at the cost of the defendant the mortgaged property, and ordering him to put the defendant in possession of the property. But where payment as above is not made, the Court shall on the application of the plaintiff pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all rights to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(2) **Sale:** Where the payment as above is not made, the Court on the application of the plaintiff shall pass a final decree directing that the mortgaged property or a sufficient part thereof be sold and that the proceeds be paid into Court to be applied in payment of the mortgage dues. But where on or before the day fixed or at any time before the confirmation of sale the defendant makes payment into court of all amounts due the court on the application of the defendant shall pass a final decree or if such decree has been passed, an order ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and if necessary, ordering him to transfer the mortgaged property as directed in the said decree, and also if necessary, ordering him to put the defendant in possession of the property. But where the mortgaged property or part thereof has been sold in pursuance of a decree the court shall not pass such an order unless the defendants in addition to the above amount deposits in court for payment to the purchaser a sum equal to five percent of the amount of the purchase money. The purchaser shall be entitled to an order for repayment of the amount of the purchase money together with a sum equal to five per cent thereof. Where the net proceeds of any sale mentioned as above are found insufficient to pay the amount due to the plaintiff the Court, on application by him may, if the balance is legally recoverable

from the defendant otherwise than out of property sold, pass a decree for such balance.

(3) After this the plaintiff's right to the security and the defendant's right to redeem are both extinguished.

Decree in Redemption Suits.

(1) In a suit for redemption if a plaintiff succeeds, the Court shall pass a preliminary decree (a) ordering that an account be taken of what was due to the defendant at the date of such decree (i) for principal and interest on the mortgage, (ii) the costs of suit, if any awarded to him, and (iii) other costs, charges and expenses properly incurred by him upto that date, in respect of his mortgage security, together with interest therein ; or (*b*) declaring the amount so due at that date ; and (*c*) directing—(i) that, if the plaintiff pays into Court, the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and counter signs the account taken under above clause (*a*), or from the date on which such amount is declared in Court under above clause (*b*), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses together with subsequent interest on such sums respectively, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property ; and that, if payment of the amount found or declared due under or by the preliminary decree is not made on or

before the date so fixed or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree (*a*) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or (*b*) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid that the plaintiff be debarred from all right to redeem the property.

The Court may, on a good cause shown and upon terms to be fixed by it, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount, found and declared due as above or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(2) (*a*) Where before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed as mentioned hereafter, the plaintiff makes payment into Court of all amounts due from him as mentioned above, the Court shall; on application made by the plaintiff in this behalf, pass a final decree or if such decree has been passed, an order—(*a*) ordering the defendant to deliver up the documents referred to in the preliminary decree, and if necessary,—(*b*) ordering him to retransfer at the costs of the plaintiff the mortgaged property as directed in the said decree, and also if necessary, ordering him to put the plaintiff in possession of the property.

(*b*) When the mortgaged property or a part thereof has been sold in pursuance of a decree passed as mentiond hereafter the Court shall not pass an order as mentioned in clause (*a*) unless the plaintiff, in addition to the amount mentioned above, deposits in Court for payment to the

purchaser a sum equal to five percent of the amount of the purchase money ; where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him together with a sum equal to five percent thereof.

(*c*) Where payment in accordance with clause (*a*) has not been made, the Court shall, on application made by the defendant in this behalf—

(*i*) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is referred to in para (1), pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(ii) in the case of any other mortgage, not being a mortgage by conditional sale, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any be paid to the plaintiff or other persons entitled to receive the same.

(3) Where the net proceeds of any sale held as above are found insufficient to pay the amount due to the defendant, the Court on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold pass a decree for such balance. If it appears upon taking the account referred to above, that nothing is due to the defendant or that he has been over paid, the court shall pass a decree directing the defendant, if so required, to retransfer the property and to pay to the plaintiff the amount which may be found due to him ; and the plaintiff shall, if necessary, be put in possession of the

mortgaged property. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, and to the mortgage money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since that date of the preliminary decree for foreclosure, sale or redemption up to the time of the actual payment.

Interest: In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely—

(*a*) interest upto the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage – at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee, at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security upto the date of the preliminary decree and added to the mortgage money,–at the rate agreed between the parties, or, failing such rate at the same rate as is payable on the principal or failing both such rates at nine per–cent per annum ; and

(*b*) subsequent interest upto the date of realization or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges, and expenses as may be payable at the time of finally adjusting the account.

Remedy for deficit—Order XXXIV, rule 8A of the C. P. Code provides that in a suit for redemption where the net proceeds of any sale are insufficient to pay the amount due for the time being on the mortgage, i. e., if the balance is legally recoverable (suit is not time-barred) from the plaintiff otherwise than out of the property sold, the court may pass a decree for such balance.

Opening foreclosure—Foreclosure implies that the person failing to pay within the period allowed shall from that date, be stopped from redeeming it; but very often special circumstances press upon a court of equity and so a mortgagor is allowed, if he shows sufficient cause, to redeem even after foreclosure is made absolute. Thus a fresh opportunity is afforded to the mortgagor, and the foreclosure is said to have been opened. Again, such opening happens when a mortgagee sues the mortgagor on his personal covenant after foreclosure, thinking that the estate is insufficient; he can legally do it, but if he does it, the foreclosure is opened and the mortgagor gets a fresh right to redeem.[1] But if the mortgagee has so dealt with the property as to be unable to restore it on full payment, he cannot sue on the covenant.[2]

Accounts with annual rests–A mortgagee is called

1. Palmer v. Hendrie, 27 Beav. 349.
2. Lokhar v. Hardy, 9 Beav. 349.

upon to account only when the mortgagor seeks to redeem except where such redemption has become impossible. The gross receipts whether they arise from the rents or other payments are ascertained at the end of every year, and after deducting the necessary outlay on account of revenue, expenses of collection and preservation of the estate, the balance goes to reduce either in whole or in part the interest, and if there is a surplus over, it goes to the reduction of the principal, the account being closed at the end of each year.[1] If the net amount received in any year is insufficient to pay the accrued interest, surplus of interest is not added to the principal for that would result in charging compound interest which is not allowed; but the interest runs on the former principal until the receipts exceed the interest due. But if in any year the mortgagee's disbursements exceed his receipts, the amount of the deficit is added to the principal; in these matters the surplus rent is annually applied in reducing the principal. This is taking account with rest; thus, when there is a surplus of net receipts above the interest then due, the balance after discharging the interest is applied to reduce the principal, and this process is carried on and on. Rests are annual or semi-annual, according to the agreement of the parties. A rest must be made as soon as the mortgagee has received a sum exceeding the amount of interest and then they should be followed annually or semi-annually from that date. No specific provision is made to govern this system of accounts in India. S. 76, cl. (*h*) of the Transfer of Property Act says that "the receipts of the mortgaged property have to be debited against him in reduction of the amount from time to time due to him on account of interest on the mortgage-money." In England, accounts are not, as a matter of course, directed against the mortgagee; the surplus does not invariably go in reduction of the principal, for a mortgagee may claim that he shall not be paid piecemeal. If, however, there is no interest in arrear when the mortgagee enters, the

1. Redhabenode v. Kirpamoyee, 14 M. I. A, 443.

annual surplus is generally applied in reduction of the principal money, i. e., accounts are taken with rests. As held in *Ashworth* v. *Lord*,[1] a mortgagee is relieved from having his account so taken if the interest was in arrear when he entered into possession and there was other serious danger overhanging his security which his entry into possession was intended to forestall. If the mortgagee continues in possession after the debt is fully paid, accounts will be ordered from the time the debt was paid.

Bar to sale of mortgaged property—A mortgagee of property cannot bring it to sale in execution of a simple money decree otherwise than by bringing a suit under s. 67 of the Act (O. XXXIV, rule 14, C. P. Code). He can attach it but not sell. This is with the view that the mortgagor may not all at once be deprived of his equity of redemption in execution of other decrees. A sale in contravention is voidable and not void.

(*i*) According to the Bombay High court,[2] the bar is not personal to the mortgagee; if he assigns the decree for the other debt to another, the latter, cannot in execution of the money decree, bring the mortgaged property to sale otherwise than under s. 67.

(*ii*) This rule does not apply to consent decrees, for the mortgagor may waive his right.

Prob.—A had mortgaged certain property to B; and besides he owed some debts to him; for some of the latter, B obtained a decree and in execution attached the property mortgaged to him and applies for sale of the same to satisfy his decree. A comes to you for advice.

A.—If B were allowed to get the mortgaged property sold, he would perhaps buy the same himself or in the name

1. 36 Ch. D. 545.
2 Chargan v, Laxman, 31 Bom. 462.

of another and thereby deprive A of his right of redemption. To avoid this mischief, the creditor (mortgagee) should, inspite of s. 47 of the C. P. Code, bring a suit for foreclosure under s. 67 of the T. P. Act and then the property may be ordered to be sold. In this case, B will have to bring a suit under s. 67 before he can get an order as to the sale of the property mortgaged to him. B can institute a suit for foreclosure inspite of his having obtained a money decree, and to his so doing s. 47 of the C. P. Code would be no bar.

What is a charge ?—A charge is defined in s. 100 of the Transfer of Property Act thus:—" Where immovable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on that porperty. " As it is, it is very difficult to distinguish a charge from a mortgage; but the following are among some of the distinguishing points:—

Difference between a charge and a mortgage.

(1) In England, whenever a security is given on the property but it is not in the known form of a mortgage, the transaction is a mere charge; but the definition of mortgage in India is wide enough and therefore it includes many transactions which would otherwise be charges in England. In India, looking at the two definitions, it follows that, if the payment of money is secured on land but no interest in specific immovable property is transferred, the transaction will amount to a mere charge. Thus the distinction between a mortgage and a charge is that whereas a charge gives only a right of payment out of a particular fund or property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property. In that case he has no power of sale without the intervention of the court, and his rights become complete when he gets a decree for sale.

(2) A charge, like a mortgage, does not necessarily imply the existence of a debt. It is merely an interest carved out of the estate which may be substituted by a mortgage.[1]

(3) A mortgage can be enforced against a purchaser for value; a charge cannot be so enforced. A mortgage is a *jus in rem*; a charge is a *jus ad rem*, and the practical distinction is that a mortgage is good against subsequent transferees, while a charge is only good against subsequent transferees with notice.[2]

Where a maintenance decree passed after the T. P. Act merely declares a charge on the property, the property so charged cannot be sold in execution without a fresh suit for the purpose.[3]

Section 100 of the Act does not mean that a transaction, purporting on the face of it to be a mortgage, is converted into a charge if the instrument cannot operate as a mortgage by reason of defective execution or non-compliance with the formalities of law.[4]

No merger in case of subsequent encumbrance-

Section 101 of the Transfer of Property Act provides that any mortgagee or person having a charge upon immovable property or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgage or charge-holder shall be entitled to foreclose or sell such property

1 Poulet v. Hoode, 35 Beav. 234.
2 Kishan Lal v. Ganga Ram. (1891) 13 All. 28.
3 Vencatsuba, 17 M. L. J. 217.
4 Shahjada, 33 Cal. 985.

without redeeming the prior mortgage or charge or otherwise than subject thereto.

Prob.—K, the creditor of the mortgagor L, brings a suit against him, and in execution buys and obtains possession of the property which at the time of the sale is subject to a first and second mortgage. Shortly after this, K pays off the first mortgagee. M, the second mortgagee, now brings an action against him for possession. Advise K.

A.—In this case, everything would turn on whether the first mortgage was kept alive or extinguished by K. If kept alive, K can retain possession as against M. In the absence of any evidence to the contrary, law presumes that K must have acted in his interest and as would be most benefical to him. M will not in that case succeed.[1]

Charges how created—(1) By act of parties. No formal words are necessary to create it, nor is a writing essential ; but if it is reduced to writing, provisions of the Registration Act must be complied with.

Illustration—Where a portion of property is made a security for payment of legacies or annuities, memorandum showing an intention to deposit title-deeds by way of equitable mortgage.

(2) By operation of law. In English law the word " lien " is generally used for this kind of charge. But there is no difference in the effect of both.

Illustrations. (1) Charge for maintenance under Hindu law.
(2) Lien of *cestui que trust.*
(3) Lien of receiver or manager.
(4) Lien on land for outlet thereon.
(5) Lien of solicitor.
(6) Vendor's and purchaser's lien.

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1 Gocaldus v. Puranmal, 10 Cal. 1026.

A mortgage of personal property differs from a pledge—A mortgage of personal chattels is a transfer, subject to redemption of the ownership of the chattels, the possession remaining with the mortgagor. A pledge passes immediate possession to the pledgee together with special property in the chattels. If no time for redemption is fixed a pledgor can do it any time in his life—even his assignees can, and so can his personal representatives after his death.[1] But in case of mortgage, redemption must be within reasonable time after default.

The pledge covers future advances in general without express contract for the purpose.[2]

No provision is made in the Transfer of Property Act for mortgages of movable property, nor in the contract Act. Sections 172–181 of that Act speak of a pledge of movables. A pledge is defined in s. 172, Contract Act, as "a bailment of goods as a security for payment of a debt or performance of a promise" and Sir H. Cunningham in his commentary while quoting Mr. Justice Willies, says: "There are three kinds of securities: (1) a simple lien, (2) a mortgage passing the property out and out, (3) a security intermediate between the lien and a mortgage i. e., a pledge where by a contract, a deposit of goods is made the security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt. A pledge can thus be effective by transfer of possession." A mortgage is something more than a pledge, for in pledge the possession only passes to the pledgee with a right of retaining it till the debt is paid, while a mortgage transfers ownership also, subject to be defeated by the performance of the condition within a given time. Again, the distinction becomes more clear if it is remembered that a pledgee can realize his money by the sale of the pawn, while a mortgagee is entitled to

1 Kemps v. Westtroop, 1 Ves, s. 278.
2 De Mainbrage, 2 Vern. 258, 629.

foreclose. Both a mortgage and a pledge, as said above, differ from a lien, which is merely the right of detention without any power of sale or foreclosure. Hypothecation differs from pledge in that there is no delivery of property in the former, and it differs from mortgage in form rather than in substance in that there is in that case no assignment of goods by the debtor. It may be noted that a mortgage of movable property, even if unaccompanied by possession, is valid.[1]

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1 Damodar v. Atmaram, 8 Bom. L. R. 344.

CHAPTER XXI.

ADMINISTRATION OF ASSETS.

THE English law on this subject is difficult to understand and not very useful for Indian purposes. The difficulty arises owing to the distinction made between real estate and personal estate, and between legal assets and equitable assets. In India, we have nothing of this distinction, and the Indian Succession Act, 1925, lays down simple principles for the administration of the estate of a deceased person.

In England, before the Administration of Estates Act, 1833, commonly known as Romilly's Act, was passed, the law on the subject was unsatisfactory. Under common law, only the personalty to which the deceased was entitled was available for payment of debts due to the creditors. The personalty of a deceased person vested in his executor or administrator, and as such the executor or administrator was liable to all the creditors of the deceased. The personalty was known as legal assets, and any creditor could file a suit to recover his debt out of the *legal* assets. The realty of the deceased, however, did not vest in the executor or administrator, and the heir or devisee was therefore not liable to the creditors of the deceased. But the ordinary creditor could file a suit for administration for payment of all debts, in a court of equity, if the deceased had charged realty with payments of the debts or devised it to trustees upon trust to pay his debts. Realty being thus made available in equity for payment of debts was called *equitable* assets. This was, in a nutshell, the law before the Act of 1833 above mentioned was passed.

By the Administration of Estates Act, 1833, the realty belonging to the deceased was made liable in equity for pay-

ment of debts whether the deceased had charged it with payment of the debts or not. But still the realty so made liable for the payments of the debts did not vest in the executors or administrators of a deceased person, who are really the persons whose duty it is to pay the debts of the deceased. This was, to certain extent, remedied by the Land Transfer Act, 1897, under which the realty vested in the personal representatives.

Under the Administration of Estates Act, 1925, the real estate in which the deceased had an interest devolves on his personal representatives. Nearly all the real and personal estate now vests in the personal representatives and all property is declared to be assets for the payment of the debts of the deceased.

Assets—The real and personal estate, whether legal or equitable to the extent of his beneficial interest therein and the real and personal estate of which a deceased person in pursuance of any general power disposes by his will, are assets for payment of his debts and liabilities and any disposition by will inconsistent with the Administration of Estates Act, 1925, is void as against the creditors, and the court shall, if necessary, administer the property for the purpose of payment of debts and liabilities.

Who may apply for administration—The proceedings for the administration of the estate may be commenced by a writ or by an originating summons issued by a creditor or a legatee or heir or anyone interested in the estate. He must be a creditor at the date of the issue of the writ or originating summons, and the claim must not be barred by the law of limitation.

Powers of executors—An executor could sell, mortgage or lease personalty absolutely. Before the Land Transfer Act of 1897, the executor could sell realty only if directed

by will or where land was charged with the payment of debts. After the Act, the powers were the same except that *all* executors who *prove* the will must concur in the sale or transfer, unless the permission of the court be first obtained.

Duties of executors—Three distinct duties of an executor in administering the estate of a deceased person, are :—

(1) The collection of the assets.

(2) The payment of the debts.

(3) The distribution of the surplus amongst the persons beneficially entitled.

Business—When a person engaged in trade or business dies, his trade or business descends to his personal representatives as part of his assets. The general rule is that the personal representatives have no authority in law to carry on the trade of the deceased.

But the business may be carried on, apart from any direction in the will, for such reasonable time as may be necessary to enable the executor to sell it to the best advantage of the estate, i. e., for the purpose of winding up. The case of an executor or administrator in this respect is very hard; for if the trade be beneficial, the profits are applicable to the purposes of the trust and the executor or administrator derives no personal benefit from the success. If, on the contrary, the trade proves a losing concern, the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death.[1] Where the business is carried on under a power in the will, the authority must be distinct and positive to authorize executors to carry on the trade or permit it to be carried on with the assets. Executors are personally liable to the creditors of the

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1 Barker V. Parker I. T. R. 295.

business for any debts or liabilities incurred in the course of the business, where the business is carried on whether under a power in the will or without any such power.[1]

Where the executor is authorized by the will to carry on business, though he is personally liable for the debts, he is entitled as against the beneficiaries to be indemnified out of the estate of the testator which he is authorized to employ in the business. The remedy of the creditor of the business for the debt incurred after the death of the deceased is against the personal representative personally and not against the estate of the deceased. But he can enforce his claim against the assets by subrogation to the right of indemnity of the executor where he is entitled to claim such an indemnity.[2]

As regards the priority of the creditors of the testator, and the creditors of the business, it has been laid down that business creditors are entitled to priority over the testator's creditors where the latter have assented to the carrying on of the business, but where they have not assented, they are entitled to be paid first. Merely standing by with knowledge that the business is carried on, and abstaining from interference with it will not constitute assent[3]

Executor's right of preference—As among creditors of equal degree, an executor has a right to prefer one creditor to another, e. g., he may pay one in full leaving nothing for the others Since the Administration of Estates Act, 1869, simple contract creditors and specialty creditors are placed on an equal footing, so that one simple creditor may be paid before a specialty creditor. Before 1926, the right of preference was confined to legal assets only, but after the Administration of Estates Act of 1925, the right extends to all assets of the deceased.

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1 Labouchere v Tupper, 11 Moo P C. 198; Debendra v. Hemchandra 31 Cal, 253; Jethabhai v. Chhotalal 34 Bom. 203; Laxmichand v. Bai Kuverbai, 29 Bom. 170.

2. Sanka Krishna v. The Bank of Burma 35 Mad 692, Vishwanath v. Raghunath. 40 Bom. L. R. 458.

3. In re Oxley, Hornby v. Oxley (1914) 1. Ch. 604.

Executor's right of retainer-The executor's right of retainer is his right to pay his own debt in full out of legal assets in preference to other creditors of equal degree with himself. It is analogous to his right of preference. The right of retainer shall apply to debts owing to the personal representative in his own right, whether solely or jointly with another person[1] and it is exercisable in respect of all assets of the deceased. The right of retainer has been based on his inability to sue himself. Though generally known as the executor's right of retainer, it may be exercised by an administrator. If an executor dies without exercising this right of retainer, *his* executor can exercise the right. If the assets are of less value than the debt, they may be retained in specie; it is not necessary to realize them.

Under the Indian Succession Act there is no such thing as a right of retainer; see s. 323 of the Act.

Where the estate of a deceased person is insolvent, the funeral, testamentary and administration expenses shall have priority. Subject to this, the same rule shall prevail as to the priority as may be in force under the law of bankruptcy.[2]

Where the estate of a deceased person is solvent, property will be distributed in the following order:[3]—

(1) Funeral, testamentary and administration expenses.

(2) Property undisposed of by will, subject to the retention of a fund sufficient to meet any pecuniary legacies.

(3) Property of the deceased not specifically devised or bequeathed but included in a residuary gift subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies.

1. Administration of Estates Act, 1925, s. 34, cl. (2).
2 Administration of Estates Act, s, 34, cl. (1).
3. Administration of Estates Act, s. 34, cl. (3).

(4) Property of the deceased specifically appropriated or devised or bequeathed for the payment of debts.

(5) Property charged with or devised (either by specific or general description) subject to a charge for the payment of debts.

(6) The fund, if any, retained to meet any pecuniary legacies.

(7) Property specifically devised or bequeathed rateably according to value.

(8) Property appointed by will under a general power rateably according to value.

This order may be varied by the will of the deceased and it does not affect the liability of land to answer the death duty imposed in exoneration of other assets.

Duties of an executor or administrator in India— It is the duty of an executor to provide for the performance of the necessary funeral ceremonies of the deceased. He shall, within six months from the grant of probate or letters of administration or such further time as the court may appoint, exhibit an inventory containing a true estimate of all the property in possession, and within one year from the grant shall exhibit an account of the estate showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

Funeral expenses, the expenses of obtaining probate or letters of administration, and wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant shall be paid before all other debts.

It is the duty of the executor or administrator to collect, with reasonable diligence, the property of the deceased and the debts due to him at the time of his death.

The executor or administrator must pay all the debts of the deceased, including his own, equally and rateably so far as the estate of the deceased will permit, and no creditor, whether special or simple, shall have any priority over another on any account.[1] The executor's right of retainer is not recognized in India.

Debts of every description must be paid before any legacy.[2]

Power of an executor or administrator—Under s. 307 of the Indian Succession Act, an executor or administrator has power to dispose of the property of the deceased vested in him, either wholly or in part, in such manner as he may think fit. The general Power to dispose of property is subject to the following restrictions where the deceased was a Hindu, Mahomedan, Sikh, Jain or exempted person—

(1) The power of an executor is subject to any restrictions imposed by the will, unless the court granting the probate by an order in writing, permits him to dispose of any immovable property notwithstanding the restrictions.

(2) An administrator may not, without the previous permission of the court by which the letters of administration were granted, mortgage, charge or transfer by sale, gift or exchange any immovable property. He cannot lease any immovable property for a term exceeding five years.

A disposal of property in contravention of the above provisions is voidable at the instance of any person interested in the property.

An executor or administrator may incur expenditure on such acts as may be necessary for the proper care or management of any property belonging to the estate administered by him.

1. See section 323, Indian Succession Act.
2. See section 325, Indian Succession Act.

Executor's assent to legacy—The assent of the executor or administrator is necessary to complete a légatee's title to his legacy. This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

Liability of an executor or administrator for devastation—Devastation or devastavit, the term used in English law, means a waste of the assets, and mismanagement of the estate of the deceased for which the executors or administrators are personally liable. Under ss. 368 and 369 of the Indian Succession Act, if an executor or administrator misapplies the estate of the deceased or subjects it to loss or damage, he is liable to make good the loss or damage so caused. Similary, if an executor or administrator occasions a loss to the estate by neglecting to get in any part of property of the deceased, he is liable to make good the amount.

CHAPTER XXII.

LIENS.

A LIEN is a right to possess and retain the property subject thereto until some charge attaching to it is paid or discharged. Liens are either legal or equitable. Those that were recognized by the common law were legal liens, while those that were enforceable only in courts of equity were equitable.

A common law lien always depends upon possession; it exists only until the time the possession is retained and is good against the whole world. An equitable lien, however does not depend upon possession and is not good as against a purchaser for value without notice. (See the priority maxims.)

Liens are also classified as particular and general. The particular or specific lien attaches upon specific goods for the unpaid price thereof or for the work or labour bestowed thereupon. The general lien empowers detention of the goods not only for demands arising out of the article retained but for a general balance of accounts in favour of certain persons.

The following are the different kinds of liens :—

Particular lien. ... ...

- (*a*) Lien of an unpaid vendor for goods, (S. 47, Sale of goods Act.) (S. 55 (4) (*b*), Transfer of Property Act.)
- (*b*) Lien of finder of goods (S. 168, I. C. Act.)
- (*c*) Bailee's lien. (S. 170, I. C. Act.)
- (*d*) Pawnee's lien. (S, 173, I. C. Act.)
- (*e*) Agent's lien. (S. 221, I. C. Act,)

	In favour of
General lien (S. 171, I. C. Act) ...	(a) Bankers.
	(b) Factors.
	(c) Wharfingers.
	(d) Attorneys of High Court.
	(e) Policy brokers.

Solicitor's lien—A solicitor is entitled to three kinds of lien to protect his right to recover his costs from his client, viz., (1) a passive or retaining lien (2) a common law lien on property recovered or preserved by his efforts, (3) a statutory lien enforceable by a charging order.

The solicitor has a general lien on the deeds and books and papers of his client for the purpose of his costs of litigation. The lien exists only if the papers came into the hands of the solicitor *as* solicitor. Even if the solicitor is discharged by the client, still the lien exists. The lien, however, exists only against the client and not as against third persons, who might lawfully call upon the solicitor to produce those papers. Thus when a next friend of a minor who has appointed a Solicitor is superceded by another next friend the Solicitor is bound to hand over the documents relating to the suit to him as the Solicitor is in no better position than his client.[1] If the solicitor discharges himself, he has to give up all the papers, etc., to the new solicitor, but without prejudice to his lien.

A solicitor has at common law, and apart from any order of the court or statute, a lien over property recovered or preserved or proceeds of any judgements obtained for the client by his exertions The common law lien is a particular lien and is not available for the general balance of account between the solicitor and the client, but extends only to the

1 Smith v. Chichester 1842. 2 Dr. d war 393 followed in Olhanesi & Co. v Hirachand, 40 Bom. L. R. 694;
Ganesh v. Narayan I. L. R. 1939 (1) Cal. 212 In Barjar H. Vakil 41 B. L. R. 1091; Apendra v Jogendra I, L. R. 1941 (3) Cal. 289.

costs of recovering or preserving the property in question, including the costs of protecting the solicitor's right to such costs and of establishing the lien. The lien does not attach to real property. In 1860, the Solicitors' Act came into force, and by s. 28 of that Act the solicitor's rights against property recovered for his client in a suit were extended and in particular a solicitor was given a lien upon real estate recovered by him for his client.[1]

In India, there being no statute, it is the English common law as it existed before the passing of the Solicitor's Act of 1860 and the Judicature Act of 1873, that governs the rights and duties of attorneys.[2] The Calcutta and Bombay High Courts have held that solicitors have a lien such as existed in English common law before the Solicitors' Act, 1860, and this lien can only attach to what may be called personal property recovered or preserved for the client by his solicitor.

The solicitors are entitled to enforce their lien in priority to the attaching creditors so long as the moneys remain within the jurisdiction of the court. The lien, however, does not exist when moneys are once distributed to the creditors of the client.[3] The possessory lien corresponds to s. 171 of the Indian Contract Act. Under this section, the attorney has a general lien entitling him to retain the goods in his possession as a security for a general balance of account.

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1 Sadanand v. Parashram, (1928) 30 Bom. L. R. 157.
2 Tyabji Dayabhai v. Jetha Devji & Co., 29 Bom. L. R. 1196.
3 Ved and Sopha v Wagh & Co. (1925) 49 Bom. 505; 27 Bom. L. R. 558.

CHAPTER XXIII.

MARRIED WOMEN.

At common law, husband and wife were treated as one person, that is to say, the very being or legal existence of the woman as a distinct person was suspended during the marriage or at least, was incorporated and consolidated with that of her husband. Almost all the legal rights, duties and disabilities depended on the principle of the union of person in husband and wife, e.g., husband could not enter into a covenant with her or grant anything to his wife. On marriage, the husband became entitled to the rents and profits of her realty during coverture. He also became entitled to her personalty. He acquired all this interest because he had to maintain her. But as the law gave the wife no specific remedy to enforce her rights, Equity and the Legislature intervened.

As the rules of law as to the status of a married woman were rigid and her separate existence was not contemplated, the courts of equity found ample grounds for interference. The courts of equity treated husband and wife as distinct persons capable of contracting with each other, of suing each other and of having separate estates. Thus the courts of equity recognized the separate estate of married woman and she was treated as if she were a *feme sole.* The husband who received property in the right of his wife was required to make a proper settlement on his wife and children.

Gradually separate property of women came to be recognized. No special words were necessary to create separate property; if the intention of the donor was clear and unambiguous, the property which she got was regarded as her separate property with the usual incidents thereof.

Anti-nuptial contracts—Contracts between husband and wife before marriage become extinguished by their matrimonial union, e.g., if a man gave a bond to his wife before marriage, the contract created thereby was discharged by marriage. The courts of equity, however, in certain cases, enforced agreements between husband and wife before marriage, in furtherance of the intentions and objects of parties, e.g., agreements for the mutual settlement of their estates upon the other on the marriage.

Abolition of husband's liability for wife's torts and ante-nuptial contracts—Under the Law Reform Act, 1935, husband shall not, by reason only of being her husband, be liable in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obrigation incurred, by her before the marriage, or to be sued, or made a party to any legal proceeding brought in respect of any such tort, contract, debt or obligation.

Post-nuptial contracts—As regards contracts between husband and wife after marriage, they were null and void according to the principles of common law, for there was deemed to be a positive incapacity in each to contract with the other. But the courts of equity under certain circumstances gave effect to post-nuptial contracts, e.g., if a wife having a separate estate should *bona fide* enter into a contract with her husband to make a certain allowance out of the income, the contract, though void at law, would be enforced in equity.

The Married Women's Property Act, 1870 enacts, *inter alia*: "......the wages and earnings of any married woman acquired or gained by her after the passing of the Act, in any employment, occupation or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by

her through the exercise of any literary or artistic or scientific skill, and all investments of such wages, earnings, money or property, shall be her separate property."

Section 2 of the Married Women's Property Act of 1882 enacts, *inter alia*: "...... every woman who marries after the commencement of the Act shall be entitled to have and hold and *dispose* of as her separate property all real and personal property which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband or by any exercise of any literary, artistic or scientific skill."

Her powers of disposition are wide, as will be seen from the above. She could dispose of her property by deed or will.

We will now explain some of the technical terms occurring in the discussion of this branch of equity :

(1) **Pinmoney**—may be described as an allowance settled upon a wife before marriage for the purpose of her separate personal expenditure. It is designed to defray her personal expenses and to purchase dress and ornaments suitable to her husband's rank so that it shall not be necessary for those purposes that she should apply to her husband for money.

(2) **Paraphernalia**—Such apparel and ornaments of a wife as are suitable to her condition in life; e. g., jewels given to her to be worn on her person are called her paraphernalia. The husband has the power to dispose of the paraphernalia either by sale or gift *inter vivos*, but not by will. It is

also liable to debts of the husband, but the widow's claim to paraphernalia is preferred to general legacies.

(3) **Restraint on anticipation**—Since the courts of equity recognized the separate estate of a married woman, it became necessary to devise means for preventing the property from destruction through the wife's improvidence and voluntary alienation in which her husband might exercise undue influence to the prejudice of the wife's interest. Thus equity preserved the property of a married woman by providing that the wife should not have power to alienate the property or to anticipate the enjoyment of the income thereof. This was known as the restraint on anticipation which was deemed just and reasonable, inasmuch as it tends to further the object for which separate estate was first created. Even after the passing of the Acts of 1882 and 1893, the restraint on anticipation, though originally an incident of equitable estate only, may be annexed to property which is separate estate by virtue of the Act.

A married woman can now acquire, hold or dispose of any property and can sue and be sued in respect of any contract or tort in all respect as if she were single, and since January 1st 1936, no restraint on anticipation may be imposed which could not have been imposed on a man.

(4) **Wife's equity to a settlement**—If the husband had to take proceedings in equity to recover the wife's property, equity helped him and allowed him to receive it, " subject to his making a fair settlement on the wife out of that property, " This was called the wife's equity to a settlement.

See the maxim " He who seeks equity must do equity. "

The wife's equity to a seettlement was an invention of the Court of Chancery to mitigate the legal doctrine as to the rights which marriage formerly gave a husband as to his wife's property. This principle was extended when the claimant was the husband's assignee for value or his trustee in bankruptcy. The provisions of the Married Women's Property Act, 1882, have rendered obsolete the doctrine of wife's equity to a settlement, because the husband has no longer any interest in the wife's property. Naturally, it has ceased to be of much practical importance.

In India the position of a married woman is almost the same as in England. Under the Married Women's Property Act of 1874, the wages and earnings of any married woman acquired or gained by her after the passing of the Act, in any occupation or trade carried on by her shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings and property. Any married woman may effect a policy of insurance on her own behalf. She may take legal proceedings in her own name and she shall have the same remedies, both civil and criminal, against all persons for the protection and security of her property. She would be liable for postnuptial debts and the creditor shall be entitled to sue her and to recover against her to the extent of her separate property. A husband married after 31st December 1865 shall not by reason of his marriage be liable for his wife's ante-nuptial debts. Similarly a husband will not be liable for his wife's breach of trust or devastation unless he acts or intermeddles in the trust or administration.

CHAPTER XXIV.

INFANTS.

Guardianship is a right, a duty and a trust.

The courts of equity had exclusive jurisdiction over the persons and property of infants, idiots, lunatics and married women. This jurisdiction arose partly from the peculiar relation and personal character of the parties and partly from a mixture of public and private trusts. It is probable that the jurisdiction over infants has its origin in the prerogative of the Crown as *parens patriæ* to protect the persons and property of infants, where they have no other guardian of either. The general superintendence of the Court of Chancery over the persons and property of infants is delegation of the rights and duty of the Crown. The courts have authority (1) in the appointment and removal of guardians, (2) in the maintenance of infants, (3) in the management and disposition of the property of infants and (4) in the marriage of infants.

The father is the natural guardian of his legitimate children. He is, therefore, ordinarily entitled to their custody until they attain majority. After their majority he ceases to be their natural guardian. The mother is the natural guardian of her illegitimate children.

The persons having the care of the persons and the custody of the estates of infants are termed their guardians.

The Court will appoint a suitable guardian when there is none who can act. As to who should be appointed guardians, it is a matter of discretion. The court will not ordinarily interfere if there are testamentary guardians except in cases of misconduct, because the appointment of testamentary guardians is regarded as an expression of parents' own choice or preference. The court will remove testamentary

or statutory guardians whenever sufficient cause can be shown. A ward of court is a person who is under a guardian appointed by the court.

As regards education and maintenance of infants, a father has a legal right to control and direct the education and bringing up of his children until they attain majority, even though they are wards of court; and the court will not interfere with him in the exercise of his parental authority except when by his gross moral turpitude, he forfeits his rights or, by his conduct, abdicates his parental authority or when he seeks to remove his children, being wards of court out of the jurisdiction without the consent of the court.

In regard to the maintenance of infants, whenever the infant is a ward of court, the court will direct a suitable maintenance, having regard to the rank, intended profession and property of the infant.

In regard to the management and disposal of the property of infants, the court will exercise a vigilent care over guardians in the management of the property of the infant.

As regards the marriage of infants, the court of equity has a most delicate duty which it exercises with great caution. No person is permitted to marry a ward of court without the express sanction of the court. If anybody marries a ward of court without the express sanction, he or she will be guilty of contempt of court, and ignorance of the fact that the infant is a ward of court will be no excuse. If there is reason to suspect an improper marriage, the court of equity will prevent it by an injunction.

In India, apart from certain statutory enactments, e. g., the Guardian and Wards Act, and s. 491 of the Criminal Procedure Code, it is the personal law which governs the case of guardianship of infants. For instance, the Hindu law will determine in the case of a Hindu infant as to who is

entitled to the custody and care of the Hindu infant.

Under Hindu law, a father is recognized as the legal guardian of all his male and female unmarried minor children. On the death of the father, the mother is entitled to be the guardian for her minor children. In the absence of the father and mother, elder brother is preferred; after that the paternal relations, and failing that, maternal relations will be entitled to be guardians.

Under Mahomedan law, fathers, their executors, paternal grandfathers, their executors, and executors of such executors are near guardians. The rest are remote guardians. Near guardians are entitled to the management of minor's property. Remote guardians are not entitled.

As regards the guardianship of the person of the minor, under the Sunni law, the mother is entitled to the custody of her son till he attains the age of 7 years and of her daughter until puberty. Failing mother, grandmother, then sister, then daughters of sisters, then maternal aunts and then paternal aunts. After the period of Hizanut, or in default of female relations the right of custody devolves on male relations.

In the case of other persons, father is preferred to the mother, and after his death, the mother acquires the rights.

The Guardian and Wards Act does not take away the power of any person to appoint a guardian of the person or property of minor according to the law to which the minor is subject. The court may appoint a guardian of the person or property or both, of the minor where it is satisfied that it is for the welfare of a minor. The person desirous of being or claiming to be the guardian or any relative or friend of the minor may apply to be the guardian.

In appointing or declaring the guardian of a minor, the

court shall be guided by what appears to be for the welfare of the minor, having regard to the law to which the minor is subject. In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the deceased parent, and existing or previous relations of the proposed guardian with the minor or his property.

Under s. 39 of the Guardian and Wards Act, the court may on the application of any person interested or of its own motion remove a guardian appointed by the court or a testamentary guardian for any of the following reasons:—

(1) for abuse of his trust,

(2) for continued failure to perform the duties of his trust,

(3) for incapacity to perform the duties,

(4) for ill-treatment,

(5) for disregard of the provisions of the Act,

(6) for conviction of an offence implying a defect of character which unfits him to be the guardian,

(7) for having an interest adverse to the faithful performance of his duties,

(8) for ceasing to reside within the limits of the jurisdiction of the court, and

(9) for bankruptcy or insolvency (in case of guardianship of property.)

Under s. 491 of the Criminal Procedure Code, the High Court has power to direct a minor who has been illegally or improperly detained in private or public custody within the limits of its appellate criminal jurisdiction to be set at liberty. The person who seeks to recover the custody of a minor may proceed in three ways :

(1) by a petition under s. 25 of the Guardian and Wards Act,

(2) by a regular suit and

(3) under s. 498 of the Criminal Procedure Code.

The High Court has, under its common law powers, jurisdiction to issue a writ for the production of a person outside British India, provided he is in the custody or control of a person within its jurisdiction.[1]

CHAPTER XXV.

LUNATICS.

The jurisdiction over idiots and lunatics was different from that over infants. The former was a personal trust in the Lord Chancellor, and especially delegated to him under the sign-manual of the King, and from his decree, no appeal lay except to the King in Council. On the other hand, the latter belonged to the Court of Chancery and it might be exercised by the Master of the Rolls as well as by the Lord Chancellor, and therefore an appeal lay from the decision of the Court of Chancery, in case of infants, to the House of Lords.[2]

Now the jurisdiction and procedure are regulated by the Lunacy Act of 1890. The statute empowers the court to provide for the maintenance of idiots and lunatics and for the care of their persons and estates and no more. In order that the Chancellor should deal with the property of a lunatic at all, it is necessary that a commission should be taken out or that the lunatic should be a party in a cause; otherwise the court has no jurisdiction. The jurisdiction is now vested in the Lord Chancellor and the Lord Justices of the Court of Appeal, from whose decision an appeal lies to the Court of Appeal and finally to the House of Lords.[3] When a person

1. Mahmed Ali Allabux v Ismailji, 50 Bom. 616.
2. Story's Equity Jurisprudence, 3rd Ed., P. 560.
3. Snell's Principles of Equity, P. 415.

is found a lunatic, a committee is appointed of the person and the property of the lunatic. After the appointment of the committee, no person can institute any proceeding on behalf of the lunatic except with the leave of the Court in Lunacy.

Under s. 171 of the Law of Property Act, 1925, the rights of creditors are subordinated to the needs of the lunatic, but subject to that, the Court in Lunacy will see that the debts of creditors are paid from the property under its control.

In India, we have a special enactment governing the cases of lunatics, namely, the Lunacy Act of 1912.

In the Presidency towns, the courts having jurisdiction in lunacy are the High Courts of Calcutta, Mardas and Bombay. The court may upon an application by order direct an inquisition whether a person alleged to be lunatic is of unsound mind and incapable of managing himself and his affairs. There may be directions for inquiry regarding the nature of property belonging to the alleged lunatic, the persons who are his relations, the time during which he has been of unsound of mind, etc. The application is to be made by any relative of the alleged lunatic or by the Advocate-General, and notice of the said application is to be given to the alleged lunatic. After the person is adjugded a lunatic, the court makes orders for the custody of lunatics and the management of their estate, and may give such powers to the manger as may seem necessary and proper, regard being had to the nature of the property. The manager shall not however, mortgage, charge, sell, gift or exchange the property or lease for a term exceeding ten years without the permission of the courts. The court may, if it appears to be just or for the lunatic's benefit, order the property to be sold, charged or mortgaged for the purpose of raising, securing or repaying money to be applied and which has been applied to any of the following purposes—

(1) payment of lunatic's debts,

(2) for discharge of incumbrance on his property,

(3) for his maintenance and that of members dependent on him.

Outside the Presidency towns, the Magistrate, within the meaning of the Act, has jurisdiction in lunacy. There the application for a "reception order" has to be made by petition accompanied by a statement of particulars to the Magistrate within the local limits of whose jurisdiction the alleged lunatic ordinarily resides, and it shall be in the prescribed form and-supported by two medical certificates on separate sheets of paper, one of which certificates shall be from a medical officer. The petition shall be presented by the husband or wife of the alleged lunatic or if there is no husband or wife, or the husband or wife is prevented by reason of insanity, absence from India or otherwise from making the presentation, by the nearest relative of the alleged lunatic.

The proceeding in lunacy shall cease or be set aside, if the court finds that unsoundness of mind has ceased.

CHAPTER XXVI.

Relief on the ground of Accident, Mistake, Actual and Constructive Fraud.—Legacies.—"Donatio Mortis Causa."—Accounts.—Set-off.—Appropriation of Payments.

Accident—This is one of the cases in which equity gives relief in its concurrent jurisdiction though remedy exists at law, because the latter would not be plain, *adequate* or appropriate, and would not be obtainable without much delay. Accident has been defined by *Smith* as "an unforeseen and injurious occurrence, not *attributable* to mistake, neglect or misconduct." *Snell* defines it as an unforeseen event occassioning loss and which is not attributable to any misconduct in the party or to any negligence or culpable inadvertence on his part.[1] It is relieved against in the following cases:—

(i) **Lost and destroyed documents**—This is when bonds or documents under seal, or tittle-deeds or negotiable and non-negotiable instruments are lost or destroyed. The reasons for the interference of equity in such cases are found in the fact that when such documents were lost, there could be no *profert* (production) and *oyer* (reading of it) of the same in court as was required by law in case of suits founded upon them. Relief was granted by requiring an indemnity. A recovery may be had without an indemnity, but it is generally necessary to be given. In the case of title-deeds, when it was quite uncertain as to what had become of the title-deeds, i.e., when there were special circumstances irremediable at law, equity would interfere.

(ii) **Imperfect execution of powers**—Relief is granted only when the power is imperfectly executed because of accident or mistake, and the defect is merely a formal one and not of the essence of the power. But equity will not

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1 Freeman, L, R. 10 Ch. A. 695.

interfere when the power is not executed at all, unless the power be coupled with a trust or its execution has been prevented by fraud. A clear manifestation of an intention to execute a power is necessary ; if so, aid will be rendered to purchasers for value, creditors, wives, children and charities—but not in favour of the donee of the power, husbands, illegitimate children, distant relatives and volunteers.[1]

Equity will not aid where a power is executed without the consent of the persons required to consent to the execution, unless when it is impossible to obtain such consent. Equity will supply all formal defects which are not of the essence of the transaction, and which are not made irremediable by statute.

(iii) **Where payments are erroneously made**—An executor or administrator, if he has made a payment accidentally but in good faith and with due caution, will be relieved from liability ; also when the goods of a testator have been stolen without the negligence of the executor or have been destroyed or damaged by fire. But an executor cannot call that an accident which is really a mistake of law on his part.[2] Similary, on the bankruptcy of a master, a minor apprentice would be able to recover in equity a proportionate part of the premium paid.

Accident will not be relieved against—

(1) If the party seeking relief had not a vested right but an expectancy only.

(2) If the party against whom relief is sought has equal equities.[3]

(3) If the accident arose through the gross negligence of the applicant.[4]

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1 Mansell, 2 Bro. C. C. 450.
2 Milliard, 4 Ch. D. 389.
3 Malden, 2 Atk, 2.
4 Greenway, 6 Ves. 612.

(4) If the parties were equally innocent and improvident against contingencies.[1]

(5) When there is a positive contract to a certain effect, for it is open to the parties to provide for contingencies by the contract ; injury in such cases is not unforeseen.

Indian law.—Section 35 of the Specific Relief Act.

Relief against mistake—Mistake of law—Mistake is some unintentional act or omission, the result of ignorance or surprise or of imposition and misplaced confidence. At common law *a mistake of law* (i. e., of the general law of the country and not of private rights) is no excuse, but mistake of fact is a sufficient defence. Equity, on the other hand, relieves against both mistakes of law and fact. It gives relief against a mistake of law if the party has acted in ignorance and absolute darkness of a plain and well-known rule of law ; but this is put on the ground of fraud or undue influence ; or it is combined with *surprise*. There must be a full disclosure, i. e., neither a *suggestio falsi* nor a *suppressio veri*. If the mistake is one of the doubtful point of law, it cannot be relieved against. Compromises and family arrangements are supported on this ground (provided there is no improper conduct on the part of the other). So also money paid with full knowledge of facts, though it may be under a mistake of law on the part of both parties cannot be recovered.[2]

There must be full and fair communication of all material circumstances affecting the subject matter of the agreement, which are within the knowledge of the several parties.[3] Equity does not help where the position of parties is alterd, or against *bona fide* purchasers for value without notice.

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1 White v. Nutts, P. Wms.

2 Stapilton, W. & T. L. C. ; Gordon, 3 Swanst c. 463.

3 Greenwood, 2 Dely, J., & Sm. 28.

Mistake of fact—Relief is given if the mistake is *material* (and it is immaterial whether it is unilateral or mutual) and such as a party could not ascertain by inquiry and reasonable diligence, and which the party knowing ought to have disclosed. But no relief can be had if the means of the information were equally open to both parties and no confidence was reposed. To show this, oral evidence can be adduced. If the mistake is mutual the remedy is rectification, and if the mistake is of one party only, there can be a rescission.[1] In India, rectification can be had under s. 31 of the Specific Relief Act, and rescission under s. 35 of that Act.[2] Neither of these reliefs can be claimed by the plaintiff except where there is fraud of the defendant. As a rule, this relief is not granted unless the person against whom it is granted could be put in *status quo*. But exception is made, and even without it a mistake may be relieved against, when the clearest and strongest equity demands it, as it was in the leading case of *Beauchamp* v. *Winn.*[3] With all this, equity will not interfere if the rights of third person have intervened, and relief cannot be given except by affecting those rights.

In England, relief is now given in equity against mistakes of fact in the following cases:—

(1) If an instrument is cancelled or delivered under a mistake.

(2) If there are defects in the execution of power; the principles underlying this are the same as in the case of an accident.

The principal rules which regulate the rectification of marriage settlements are stated in the leading case of Legg v. Goldwim (White and Tudor's leading cases).

(1) If both the articles and the settlement were executed before the marriage and there are discrepancies between

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1 Wilding, (1897) 2 ch 517

2 May v. Platt, (1900) 1 Ch. 6.

3 L. R. 6 H. L. 223.

them, then the settlement will be considered to express the true agreement, and equity will not interfere to make it conform to the articles.

(2) But if the settlement purports to be in pursuance of the articles, then if there be discrepancy, it will be presumed to have arisen from mistake, and equity will interfere to rectify it.

(3) Further, even though the settlement does not upon the face of it purport to be in pursuance of the articles, extrinsic evidence may be resorted to, to show that such was the intention and that discrepancy arose from mistake.

(4) If the articles precede the marriage, and the settlement was executed after the marriage, then equity will in all cases consider that articles express the true agreement and will rectify the settlement to make it conform therewith.[1]

(5) In case of *wills*, the mistake must be apparent on the face of the will. Oral evidence can be gone into to remove a latent ambiguity. Thus a mere misdescription of a legacy will not defeat a legatee unless it was given to him under a character which he had falsely assumed.[2]

Mistake will not be relieved against—

(1) If the party claiming the relief has no superior equity.

(2) If the mistake or defect is declard fatal by statute.

(3) If it is as between persons who are mere volunteers.

Mistake and accident distinguished—Mistake has reference to a state of things at the time at which the contract or other transaction in question takes place. Accident refers to some event which occurs subsequently to the transaction. Mistake is essentially subjective, accident is objective. Mistake affects the quality or character of the transaction itself. Accident introduces some modification in the

1 Smith's Principles of Equity, PP. 236-237.

2 Anderson v. Berkeley, (1902) 1 Ch. 936.

remedy which would otherwise be available or gives rise to some particular claim for relief.[1]

Actual fraud—*Actual fraud* is defined as something said, done, or ommitted, with the design of committing what the party must have known to be positive fraud. It may be noted that in equity it is not necessary to prove the fraud positively. It is sufficient if a court is satisfied of its existence, no matter how weak the evidence might be.

Equity will thus relieve in the following cases :—

(1) If there be a misrepresentation as is technically termed *suggestio falsi.* It must be of a material fact inducing the consent of the other party to the contract. It must be as to a matter of fact and not merely a statement of opinion, must have misled and injured the other party to its prejudice. It need not have been made directly to the injured party ; it is sufficient if it is made with the intention that a third party should act upon it to his own injury ; in fact the misrepresentation must be fraudulent. The injured party can get damages or may compel the misrepresentation to be made good if it is capable of being so made ; but if he has ratified the same he would lose his rights.

(2) If there be a *suppressio veri,* i. e., fraudulent concealment of a fact, which that other was under an obligation to disclose. The general rule in case of mercantile transaction is *caveat emptor*, except where silence would be tantamount to direct affirmation, e. g., in contracts *ubberrimae fidei.*

(3) If there is *gross* inadequacy of consideration, it must be an unconscionable transaction ; the inadequacy must not be such as can be easily explained away.

(4) If it is a transaction entered into by a person of unsound mind, e. g., imbecile person, an intoxicated person, lunatic or an insane person. In England, it is for the injured

1 Smith's Principles of Equity, p. 245.

party seeking to avoid the contract to show that the other contracting party knew him to be insane as not to know what he was about. If the injured party is an imbecile person or a man of weak understanding, it is for the other contracting party to show that no unfair advantage had been taken of the mental infirmity of the former. In case of intoxicated persons, it is essential before relief can be granted that the drinking must be involuntary and that the intoxication was such as utterly to deprive him of the use of his understanding at the time. If he cannot prove this, equity will not help him, and the intoxicated person will be left to his remedy at common law.

(5) If it is entered into by a person who is not a free agent, i. e., his consent is coerced under duress.

(6) If it a contract of an infants (not for necessaries).

Effect—In all these cases the transaction is voidable and not void. It cannot be avoided so as to prejudice the rights of third persons.

Constructive fraud—There is no evil, fraudulent design in the transactions which equity taints as being constructive fraud. They are transactions which would, if permitted, operate as virtual frauds upon individuals, or be prejudicial to the public welfare.

Equity relieves against—

(I) Transactions against the policy of law or contrary to general public policy, e. g., contracts in general restraint of trade or in general restraint of marriage or in violation of public trust or for suppression of criminal proceedings or marriage brocage contracts, or agreements with a foreign enemy. All these are void partly as on failure of consideration which is unlawful, and partly on ground of public policy.

(II) Transactions by way of unfair advantage between persons in fiduciary relations. The undue influence is presumed, and it is for the person occupying the position of confidence to prove that no advantage was taken by him

of his position,[1] e. g., parent and child, guardian and ward, medical and confidential advisers, ministers of religion and laymen, trustee and beneficiary ; so are legal adviser and client, principal and agent, creditor and surety. In all these cases extreme good faith is required, and any transactions entered into by them with those who are under their influence would be set aside unless proved to be genuine and *bona fide* by the person occupying the fiduciary relation. A court of equity views with suspicion even dealings entered into just after the fiduciary relationship ends.

(III) Transactions entered into with persons peculiarly liable to be imposed upon, e. g., heirs-expectants, common sailors, etc. If there is a sale a an extravagant price, the court of equity would reduce the claim of the other party. Bargains entered into with heirs would be set aside unless the contracting party proves them to be reasonable and *bona fide* ; if so, the latter will get only the amount advanced with ordinary interest.[2]

Fraud on powers—It is an established principle of equity that a donee of a limited power must execute it *bona fide* for the end desingned. Otherwise appointment, though good in law, will be held corrupt and void in equity.

The appointer in exercising such a power must act with good faith and sincerity and with an entire and single view to the real purpose and object of the power. He cannot carry into execution any indirect object or acquire any benefit for himself either directly or indirectly. The donee of the limited power cannot fraudulently release any more than he can appoint fraudulently.

Illustration.—Where a father has power of appointment among children and he bargains with some of them for some benefit for himself, e. g , the payment of his debts in

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1 Huguenin v. Baseley, W. and T. L. C. I,

2 Earl of Aylesford v. Morris, W. and T. L. C.

consideration of the appointment in their favour, such an appointment is deemed fraudulent and void.

Post-obit bonds—A post-obit bond is an agreement, on the receipt of money by the obligor, to pay a large sum exceeding the legal rate of interest, upon the death of a person from whom he (the obligor) has some expectation if he should survive him. Such bonds operate as a fraud upon the bounty of the ancestor and disappoint his intentions, for the parent or ancestor makes the disposition of his property under the supposition that it will go to his heir, whereas in reality, the stranger is made the substituted heir against his will.

Illusory appointment—Formely where a person had a non-exclusive power of appointment among a class, though with full discretion as to the amount of the shares, and he appointed to some of the objects a nominal share, the appointment was set aside as illusory and not *bona fide* following the intention of the power, e. g., if the donee of the power oppointed to A £500, to B £300 and a shilling to C, the appointment was bad, but to avoid the inconvenience of determining the limit of what was illusory, an Act was passed whereby the appointment was held good even if a nominal share was given to the object of the power. Now the appointment is not invalid on account of the omission of any of the objects altogether, under s. 158 of the Law of Property Act, 1925.

"Donatio mortis causa"—*Donatio mortis causa* is defined by *Smith* as a gift of personal property made in expectation of death, evidenced by a manual delivery of the property by the donor or by another under his direction to the donee, or anyone on his behalf, conditioned to take effect absolutely in the event of his not recovering from his existing disorder and not revoking it before his death.

Essentials.—As stated in the definition, it is necessary that—

(1) The gift must be in contemplation of death.

(2) It must be conditioned to become abosolute only on donor's death if it resulted from that existing malady.

(3) It must be accompanied with delivery which may be actual, or of the means of obtaining control over the property, and it may be to the donee or donee's agent.

(4) It must be any of the following, viz., a promissory note, bill of exchange, cheque of a third person, deposit note, mortgage-deeds, bond, policy of insurance. It cannot consist of donor's cheque (uncashed in his life time), railway stock, title-deeds.

It differs from a legacy inasmuch as:—

(1) It requires no assent on the part of the executor.

(2) It takes effect *sub modo* from the date of delivery in donor's lifetime.

It differs from a gift inter vivos inasmuch as:—

(1) It is revocable during the donor's lifetime.

(2) It is liable to donor's debts on deficiency of his assets.

(3) It is subject to legacy duty.

(4) It is good between husband and wife. (*Snell.*)

Different kinds of legacy—Legacy is a gift of a chattel by will; it can be recovered in equity without the assent of the executor, though it could not be at common law.

(1) It is *general* when it is payable out of the general assets; no particular fund is mentioned out of which it can be paid. If the assets prove deficient to pay all, the legacy is subject to an abatement *pro rata.*

(2) It is *special* when it is a gift of a particular or specified part of the testator's personal estate. A specific

legacy is not liable to abatement, i. e., is not affected by general assets turning out deficient. It is, however, liable to ademption and fails if the subject-matter is alienated or destroyed in the testator's lifetime.

(3) *It is demonstrative* when it is general in its nature, but there is a particular fund pointed out to satisfy it. It is not liable to abatement like general legacies until the fund out of which it is payable is exhausted, and is not liable to ademption by the mere alienation of the fund because the fund pointed out is merely the preferential one and not the only one.

As to provisions prevailing in this country, see the Indian Succession Act.

Accounts—Formerly at common law an action of account lay in two cases only ; but suitors preferred equity because of its power of discovery and administration. Equity exercises jurisdiction in every suit for account, whether incident to a legal or to an equitable right or claim. In England the taking of accounts is assigned altogether to the Chancery Division, for the Queen's Bench Division cannot afford to cope with the complicated accounts. An account is *open* of which the balance is not struck or which is not accepted by both the parties. As soon as it is accepted by the parties it is called a *settled* account. The general defence to an action for account is that the account has been settled. When an account has been settled and a balance struck, equity will not usually interfere. In such a case the remedy at law for the recovery of the balance is complete. The fact of such a settlement, therefore, usually affords a conclusive defence to an action for an account. The question really is whether there has been a settlement, of fact. If the court is satisfied as to the settlement, a mere irregularity in the mode of taking the account will not be a sufficient ground for re-opening it. But equity

does interfere when there is accident, mistake, omission or fraud:—

(*a*) It directs the whole account to be re-opened and a fresh one taken *de novo*, or

(*b*) It may allow the account to stand, with liberty to surcharge and falsify, i. e,. showing an omission for which credit ought to have been given or proving an item to be wrongly inserted.

Among other defences are laches and acquiescence and limitation.

The burden in these cases is on the party who seeks to have the account re-opened; but generally it is not re-opened when a long time has elapsed, except in the case of fraud when a person is entitled to his rights at any moment.

Appropriation of payments—This also forms a part of the jurisdiction of Chancery Courts in account matters. *Clayton's* case is the leading authority on the point of appropriation of payments when a debtor owes several debts to a person.

(1) Primarily, it is the right of the debtor to make it expressly or under circumstances from which appropriation can be inferred. The right must be exercised at the time of payment, if not, it is lost.

(2) If the debtor has made no appropriation expressly or impliedly, the creditor can appropriate the payment to any debt actually and legally payable though time-barred. He can in equity appropriate at any time before the action is brought or account is settled.

(3) If no appropriation is made by either party. the appropriation is made by presumption of law according to the order in which the items stand in the account; the first

item on the credit side discharges the one on the other side. Payment is generally appropriated to interest before principal. This third rule is known as the rule in *Clayton's* case. The Indian law on the point is to be found in ss. 59-61, Indian Contract Act.

Set--off—There can be set-off between debts accruing in the same (and not different) rights. Equity allows a set-off when the credit is mutual, i, e. where the party incurring the second debt did so in reliance on the former debt as a means of discharging it. But when the debts accrue in different rights, e, g., a joint debt of a family against the personal debt of one's own, or one in his capacity as executor and another in his individual capacity, there can be no set-off. It is merely a counter-claim, and a distinct suit must be brought for it In England, set-off is not allowed if the equity of third persons would be prejudiced ; thus a shareholder in a winding-up matter cannot set-off a debt due to him from the company against calls due from him because other creditor would thereby suffer. He must pay his calls in full, though his getting his debt from the company to the full extent remains doubtful.[1]

Indian law—Set-off is of two kinds, legal and equitable. Under Order 8, rule 6 of the Civil Procedure Code, the defendant may claim a set-off, provided the conditions mentioned therein are satisfied. The conditions essential for a legal set-off are as under :—

(1) The suit must be one for the recovery of money.

(2) The amount must be an acertained sum of money and not unliquidated damages.

(3) The amount must be legally recoverable by the defendant.

(4) It must be recoverable from the plaintiff or all the plaintiffs if more than one,

1 Banner v. Berridge, 18 Ch. D. 254.

(5) It must not exceed the pecuniary limits of the jurisdiction of the court in which the suit is brought.

(6) Both parties must fill the same character as they fill in the plaintiffs suit.

The illustrations to the rule very clearly show the application of the rule.

Sometimes the defendant is allowed a set-off even in respect of an unascertained sum of money sounding in damages. He may set-off such claim for damages provided it arises out of the same transaction as the transaction in the suit. Such set-off shall have the same effect as a cross suit (High Court rule 126). Order 20, rule 19 (3) recognizes an equitable set-off. The defendant can plead an equitable set-off only in the exercise of the general right and not under Order 8, rule 6, which is confined to legal set-off only.

CHAPTER XXVII

Definitions of settlement and obligation.—Saving clause. —Modes of granting specific relief.—Enforcing penal law.—Specific delivery of movables.—Contracts that can and cannot be specifically enforced.—Discretion of Court.—Specific performance of part of contract.—Effect of disrtuction of subject-matter.

Specific performance—Equity has invented two great remedies—remedies peculiar to itself—the decree for the specific performance of a contract, and the injunction. In granting a decree of specific performance, the court of equity in effect says to the defendant that he must do the very thing he promised to do. The remedy of specific performance is, however, discretionary. The remedy at common law for the breach of a contract was by way of damages and damages only. This remedy was, in many cases, especially in case of contracts for the sale or lease of land, inadequate, and the court of equity therefore granted a decree for specific performance of the contract. This inadequacy of the remedy at law was the ground of the jurisdiction of specific performance.

Definitions—"*Obligation*" includes every duty enforceable by law and "*settlement*" means any instrument other than a will or codicil whereby the destination or devolution of successive interests in movable or immovable property is disposed of or agreed to be disposed of. The term "obligation" is used in its juridical sense to include every duty springing out of contract or tort. In English law this term is used in a limited sense as connoting only duties arising on contract. The definition of the term shows that it does not contemplate devolution of interest in favour of one person only or a body of persons concurrently.

Saving clause—This Act does not, except where expressly enacted—

(*i*) give any right to relief in respect of an agreement which is not a contract, i. e., there can be no relief in respect of a void agreement ;

(*ii*) deprive any person of any right to relief other than specific performance which he may have under any contract, i. e., right to alternative relief is not lost. The Act does not restrict a person to a particular relief. But he must not seek so as to come under the bar of s. 29 ;

(*iii*) affect the operation of the Registration Act on documents.

Modes of relief (s. 5)—It can be given in any of the following ways:—

(1) By taking possession of certain property and delivering it to the claimant (ss. 8, 11).

(2) By preventing a party from doing an act which he is under an obligation not to do, i. e., injunction (ss. 53, 57)—negative relief.

(3) By ordering a party to do the very act which he is under an obligation to do (ss.12,30), viz., specific performance of contracts, *mandamus* (ss. 45, 51).

(4) By determing and declarining the rights of parties otherwise then by an award of compensation, e. g., declaratory decree, rescission, rectification (ss. 31 to 43).

(5) By appointing a receiver (s. 44).

Specific relief cannot be granted to enforce a penal law. The real object of giving specific relief is to protect some civil right of a person or to protect a wrong done to him.[1]

Possession of immovables—Under s. 9, a person who is dispossessed without his consent of immovable property otherwise than in due course of law, may himself, or any other person claiming through him may, by a suit

1 Bank of Bangal, 8 Cal. 166.

instituted with in six months from the date of dispossession, recover possession thereof, notwithstanding any title that may be set up in such a suit. In such a suit the court has not to go behind the fact of possession and has not to determine title. Such a suit cannot be brought against Government. There is no appeal against or review of the decree passed in such a suit ; but an *ex-parte* order can be set aside. The only remedy of the aggrieved party (one ejected) is to bring a regular civil suit to establish his title to the property and for recovery of its possession. For the Bombay Presidency there is a special Act, II of 1906 which empowers a Mamlatdar in a summary suit to give relief to a person dispossessed otherwise than in due course of law, provided the suit is instituted within six months from the date of dispossession ; but this differs from the relief under s. 9. of the Specific Relief Act in this, that there can be a review of a Mamlatdar's order and a suit can be brought against Government, whereas that cannot be done under s. 9 of this Act. It should be noted that a trespasser cannot bring a suit under s. 9 because he cannot be said to have been in possession.[1]

(*i*) The object of section 9 is to discourage people taking the law in their own hands, however good their title may be.[2] It provides for the summary removal of anyone who dispossesses another, whether peaceably or otherwise, than by due course of law.[3] In England this was formerly known as *inter dictum de vi.* This section is based upon the old English Assize of *novel disseisin.*

(*ii*) A suit under this section would not lie if a previous suit for the same relief is dismissed by the Mamlatdar.

(*iii*) This section contemplates cases of *de facto* and legal possession, it must be one founded in right, i. e., not mere recent possession of a trespasser or mere physical

1 Dadaboy v, Collector of Broach, 7 Bom. H, C, R. 82.

2 Krishnarav, 8 Bom. 371.

3 Bindu, 15 Bom. 238.

possession or occupation of land suddenly taken and acquiesced in, is not enough. The court can consider the question of title so far as is necessary to decide whether the person alleging dispossession was in juridical possession as between the plaintiff and the defendant.[1]

(*iv*) Dispossession must be physical ; merely telling a tenant not to pay rent is not enough.[2]

(*v*) The phrase "otherwise than by due course of law," i.e., the ordinary method of a suit, means by process and operation of law and not confined to legality ; it means without the intervention of the court.[3]

Prob.—During B's absence from his house, A trespasses upon his property ; but within four months B ousts A, whereupon A brings a suit for recovery of the property under s. 9 of the Specific Relief Act ; adjudicate upon A's claim. To what court will the appeal lie from the order passed in the case ?

A.—It has been ruled by the Bombay High Court that a trespasser who is dispossessed cannot bring a suit under s. 9, for recovery of possession contemplated by the section is juridical and not merely physical possession. A's suit must, therefore, fail. No appeal lies from the order dismissing A's suit.

Specific delivery of movables (s. 11)—It will be ordered by the court on a suit brought by the person entitled to immediate possession—

(1) If the thing claimed is held by the defendant as agent or trustee of the claimant. It is not necessary that the thing should have a peculiar intrinsic value ; it is sufficient if a fiduciary relation exists between the parties.[4]

1 Amirudin, 15 Bom. 685.
2 Tarini, 14 Cal. 649.
3 Rudrapper. 29 Bom. 213
4 Wood v. Rowcliffe, 3 Hare 304.

(2) When compensation in money would not afford the claimant adequate relief for the loss of the thing claimed.

(3) When it would be extremely difficult to ascertain the actual damage caused by its loss, e, g., in case of chattles of unique value, articles of curiosity, family inscriptions,[1] heirlooms, ancient inscriptions; of such movables it is very difficult to measure the loss in money, and hence specific delivery is decreed; so also, if the shares be of private companies not easily obtainable in the market,[2] but not so in the case of sale of public stocks.[3]

(4) When the possession of the thing claimed has been wrongfully transferred from the claimant.[4]

What contracts can be specifically enforced (s. 12)—This is at the discretion of the court; but generally it would be if :—

(1) The act agreed to be done is in the performance wholly or partly of a trust. The very act or thing which the contract provides has to be done in *specie*.

(2) When there is no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done; i, e., when the subject-matter has a conjectural value not ascertainable, e. g., in case of peculiar chattles of antiquity, curiosities, agreement to retire from business,[5] to sell two ancient china jars,[6] or not to carry on the same trade.[7]

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1 Falcke v. Grey, 4 Drew 658.
2 Nicol's case, 29 Ch. D. 428.
3 Pusey v. Pusey, 2 W. T. 454; Duke of Somerset v. Cockson, 2 W. T. 453.
4 Nutbrown v. Thornton, 10 Ves. 159.
5 Gray v. Smith, 43 Ch. D. 208
6 Falcke v. grey, 4 Drew 658.
7 Kemble v. Green, 383.

(3) When the act agreed upon is such that pecuniary compensation would not afford adequate relief; unless and until the contrary is proved, the breach of a contract to transfer immovable property is presumed to be such as cannot be adequately compensated by damages, while that for movable property can be; thus in case of immovables specific performance has become a rule, as it were; while in case of movables, an exception merely, except in cases falling under s. 11. On this ground, in the English case of *Duncruft* v. *Albrecht*,[1] contracts to convey public stock were not orderd to be specifically performed because compensation in money would afford adequate relief, they being easily procurable in the market without a material change in the price; but shares in private companies, not being so obtainable, have to be specifically delivered over[2]; so also in case of a contract for the sale of timber peculiarly convenient to the purchaser by reason of its vicinity, or for purchase of assigned debts under a bankruptcy.[3]

(4) When pecuniary compensation cannot be got for the non-performance of the act, e. g., contracts for personal acts, covenant to lease, to endorse a bill, settle boundaries; etc.

(i) In equity, specific performance of a contract is enforced on the ground of the inadequacy of damages recoverable at law.[4]

(ii) A court will not decree specific performance of illegal or immoral contracts, e. g., a prospective separation agreement, or if the agreement is without consideration, or revocable or determinable at will.

Meaning of "specific performance"—This is

1 Buxton v. Lister, 3 Atk. 384.
2 12 Sim. 189,
3 Adderly v. Dixon, 1, S. and S. 607.
4 Buxton v. Lister, 3 Atk. 383.

used in two senses : (i) in the sense of turning an executory contract into an executed formal contract by decreeing the execution of the document, and (ii) in the sense of carrying out in *specie* the very act or thing which the contract agrees shall be done. The former is the more correct meaning in cases where the court decrees specific performance of a contract as distinguished from cases where the court *merely* procures the specific performance of it by an injunction.

Contracts which cannot be specifically enforced (s. *21*).—(1) Those for the non-performance of which compensation would be an adequate relief, e. g., those for borrowing and lending money, to sell Government stock, etc.[1]

(2) That which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the court cannot enforce specific performance of its material terms.

Illustrations.—(*i*) Contracts to render personal service. Thus a person cannot be allowed to enforce a managing agency agreement agaist a company[2] nor can an agreement to take another as a co-agent be specifically enfored.[3]

(*ii*) Contracts to do act involving special skill e. g., painting a picture, or by an author with a publisher to write a literary work.[4]

(*iii*) Agreement to build and repair.[5] It is specifically enforced only where it is definite in its nature and the plaintiff has no other remedy.[6]

(*iv*) Agreement to marry.[7]

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1 South African Territories v. Wellington, (1898) A. C. 309 ; Cudee v. Rutter, 2 W. T. 416.

2 Nusserwanji v. Gordian 6 Bom. 266.

3 Ramchandra v. Chinubhai 45 Bom. L. R. 1075.

4 Lumley v Wanger, 5 De G. and M, 485.

5 Ryan, (1893) 1 Ch 116.

6 Love v. Newdigate, 10 Ves. 192.

7 Umed v. Nagindas, 7 Bom, H. C, 122.

(*v*) Contracts without consideration, i. e., merely voluntary agreements.[1]

(*vi*) If there is no mutuality, i, e., if the remedy is not reciprocal and mutual ; but this doctrine does not apply in India.[2]

(*vii*) Agreement to sell the goodwill of a bussiness apart from the business.[3]

(3) A Contract, the terms of which cannot be fixed with certainty.[4]

(4) A contract which is in its nature revocable, e. g., one to enter into a partnership which does not specify the duration thereof.[5]

(5) A conract made by the trustees in excess of their powers or in the breach of the trust.

(6) A contract which involves the performance of a continuous duty extending over a longer period than three years from its date. In *English law* there is no specific period ; it is sufficient if the performance of the duty extends over a considerable period.[6] It fails as to whole and is not upheld even as to first three years ; even if it is for a period not extending to three years the court would not enforce specific performance if it cannot superintend the performance. This does not apply to negative covenants.[7]

(7) A contract of which a material part of the subject-matter supposed by both parties to exist, has, *before* it has been made, ceased to exist. This differs from s. 13, whereby

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1 Jeffreys, Cr. and Ph. 141.

2 Flight v Bolland, 4 Russ. 298 ; Krishansami v. Sundrapayar, 18 Mad. 416.

3 Baxter v. Conolly, 1. J. and W. 576.

4 Paris Chocolate Co. v. Crystal Palace Co. 3 Sim. and G. 119.

5 Scott v. Rayment, 7 Eq, 192.

6 Powell v. Taff Vale, R, W. 9 Ch. Ap. 331 ; Shamnugger Jute Co. v. Ramnarain, 14 Cal. 189.

7 Madras R. Co. v. Rust, 14 Mad. 180.

provision is made for the subject-matter ceasing to exist after it is made.[1]

(8) A contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters thereof in excess of its powers, i. e., for objects foreign to it.[2]

(*i*) A corporation differs from a public company in this, that a corporation cannot depart from the statute or charter creating it, whereas members of a public company can, by passing special resolutions.

(*ii*) The fact of a contract being *ultra vires* can be shown by the express provisions of law creating the company, or by necessary inference therefrom.

(9) A Contract to *refer a controversy to abritration shall* not be enforced save as provided by the Arbitration Act X of 1940. But the existence of such a contract bars a suit in respect of subjects agreed to be so referred. There must be a distinct refusal to perform that contract, and it has been held that the mere filing of the plaint is not a distinct refusal. It must be before action is brought ; again, the contract must be really operative and not one broken up by the conduct of the parties thereto.[3]

(*i*) This clause covers contracts to refer any matter which can be legally referred to arbitration—even a pending suit.

(*ii*) It is for the defendant to prove the fact of refusal before he can rely on the bar created by s 21. Application for leave to withdraw from arbitration is evidence of withdrawal.

Prob.—Can any of the following contracts be specifically enforced ? If so, under what circumstances ?

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1 Couturier v. Hastie, 9 Ex. 102.

2 Imperial Ice Mfg. Co. v. Manchershaw, 13 Bom. 415.

3 Kumud Chander v. Chandra Kant, 5 Cal. 498 ; Tahal v. Bisheshar, 8 All. 57.

1. A contract to sell 10 shares in the B. B. & C. I. Railway Company.
2. A contract to deliver a course of lectures on the study of law.
3. A contract by an incorporated cotton spinning mill to reclaim waste land.
4. A contract to enter into partnership.
5. A contract to act as agent.
6. A contract to marry.
7. A contrct to charter a vessel.

A. 1. Yes ; shares are in a private company, besides being limited in number, and of a fluctuating value, not easily available in the market ; there can be no measure of compensation in money ; specific performance would, therefore, be an adequate relief.[1]

2. No ; because delivering lectures depends entirely upon the personal qualifications and volition of the lecturer.[2]

3. No ; it is a contract by an incorporated company in excess of its powers ; it is no part of the purposes of a cotton spinning mill to reclaim waste land unless it be specifically put in the memorandum of association; whether reclaming would be profitable or not is immaterial ; it is sufficient if it is foreign to the objects of the corporation, for the funds of the corporation can go only to the purposes for which it is created.[3]

4. It is only when the term or duration of the partneship is fixed and there are acts of part performance that a court of equity would enforce specific performance of a contract to enter into partnership ; or else it would be refused, since entering into partnership is an agreement entirely revocable in its nature.[4]

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1 Duncruft v. Albrecht, 12 Sim. 189 ; Lumley v. Wagner, 5 Deg. & Sm. 485.

2 Sheomber v. Devdat. 9 All. 168,

3 Imperial Ice Mfg. Co. v. Manchershaw, I. L. R. 13 Bom. 415.

4 Scott v. Rayment, 7 Eq. 112 ; Hercy v. Birch, 9 Ves. 357,

5. No ; acting as agent is a matter entirely dependent on the knowledge, skill and inclination of the parties.[1]

6. No ; it has been held by the Bombay High Court in *Umed* v. *Nagindas*.[2] and *Thakersy* v. *Gomti*,[3] that such a contract cannot be specifically enforced.

7. No ; pecuniary compensation will be an adequate relief for its non-perfomance.

Prob.—A, the owner of a refreshment room, contracted with B to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. On the owner's refusal to perform his contract, B sued for specific performance of the contract. Will he succeed ?

A.—No ; the contract in question was one, the terms of which could not be found with reasonable certainty ; there was no mention as to the amount and nature of the accommodation and appliances ; these being undefined, naturally it follows [s. 21 (*c*)] that there can be no specific performance ; compensation only will be decreed.[4]

Prob—X and Y enter into a contract for the sale of cotton, and the contract coutained a clause to the effect that any dispute arising hereafter shall be settled by arbitration ; Y refused to take delivery, whereupon X filed a suit against him for damages. Is X's suit maintainable ?

A.—Yes ; it has been held by the Calcutta High Court that merely filing a suit is not refusal to refer to arbitration; under the Civil Procedure Code, it is only on distinct refusal that the fact of the existence of a contract to refer disputes to arbitration can be set up as a defence to suit on the contract. In this case, therefore unless Y shows that there was a distinct refusal on the part of X to refer the dispute to arbitration, the fact of the contract cannot be set up by him and the suit of X is maintainable.[5]

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1 White v. Baby, 37 L. T. 652.

2 7 Bom, H. C. 122.

3 11 Bom. 244.

4 Paris Chocolate Co. v. Crystal Palace Co , 3 Sim. and G. 119.

5 Kumudchunder v. Chundrakant, 5 Cal, 498.

Nature of court's jurisdiction (s. 22)—It is altogether discretionary and not a matter of right of the parties. Court is not bound to grant specific performance even if it be lawful to do so ; however, this discretion is not to be arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of Appeal. Each case depends upon its own circumstances.

(1) If the circumstances are such as to give the plaintiff an unfair advantage over the defendant, then though there be no fraud or misrepresentation on the part of the former, the court will not decree specific performance. A court of equity will not interfere if both the parties were, at the time of making the contract, on equal terms, i. e., had equal means of knowledge, though their relative positions might subsequently turn out to be different from what they supposed it to be. Unfairness need not be intentional ; unfairness is not to be judged by susequent events. It must be at the time the contract is entered into.[1]

(2) If the performance o the contract would involve a hardship on the defendant, which he could not foresee, whereas its non-performance would involve no hardship on the plaintiff, the court will not interfere. " He who comes into equity must come with clean hands. " A court relieves a defendant against hardship though there may be an improper conduct on the part of the plaintiff. It does not mean mere improvidence or inadequacy ; it means that the transaction should be unconscionable, such that its performance would be inequitable. A court will not help a defendant if he has brought it about himself or because the object he had in view in entering into the contract has become impossible. It must be such as the defendant could not foresee. No relief can be given if the parties cannot be placed in *status quo*.

1 Culliangi v. Narsi. 18 Bom. 703.

But if the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance, the court would decree it ; in such cases a court of equity always does its best to get the agreement carried out.[1]

Prob.—A sells some land to a railway company who contracts to construct and maintain a siding of some length on A's land adjacent to the line of the company. The company, however, refuses to construct the siding. Advise A.

A.—A can sue for specific performance of the contract to construct the siding. He having suffered loss in consequence of the contract which was capable of specific performance, the court would exercise its discretion to decree the same. Moreover, specific performance can be decreed under s. 12, cls. (c), (d), for pecuniary compensation would not afford adequate relief and there is no standard to measure the damage caused to A.[2]

Prob.—P agreed to purchase a plot of land surrounded on all sides by private properties ; no right of way to the plot could be shown to exist ; the agreement of sale did not make any mention thereof. P Consequently refused to completed the purchase. Can P resist a suit for specific performance brought against him ?

A.—Yes ; there being no right of way to the land agreed to be sold, the performance of the agreement would involve some hardship on the defendant, which he did not see ; while the non-performance would not involve any such hardship on the plaintiff. The court may then exercise its jurisdiction not to decree specific performance.[3]

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1 Kirk v. Bromley Union, 2 Ch. 640.

2 Green v. west Cheshire R. Co., L. R. 13 Eq 44.

3 Denne v. Light, 26 L. J. Ch. 459.

Specific performance of part (ss. 14, 15 and 16).–If at all the contract must be performed in its entirety, as a general rule a court of equity, will not direct specific performance of a part of a contract; but certain exceptions to this are recognized by the Specific Relief Act, ss. 14, 15 and 16. Thus if a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed bears only a small proportion to the whole in value *and* admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency. But if the part which must be left unperformed forms a considerable portion of the whole *or* does not admit of compensation in money, the party in default is not entitled to obtain a decree for specific performance. However, the court may at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance and all rights to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendant (ss. 14-15) In section 16 it is ruled that "when a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the other part." In no other case is a part only of a contract to be specifically enforced (s. 17).

The reason of the rule is stated by *Fry J.*, in *Mackenzie*[1] to be that a mere difference in quantity has never been held by a Chancery Court to be a bar to specific performance. It draws a distinction between the essential and non-

1 L R. 7 Ch, D. 180.

essential terms of a contract and allows incapacity to perform its non-essential terms to be made the subject of compensation.

English law.—The Illustrations to this are to be had in cases of contracts where there is a stipulation as to time, or where there is a misdescription of property ; where time is of the essence of the contract and the stipulation is broken, the defaulter cannot get specific performance of the rest of the contract ; but the promisee, if he elects to have the specific performance thereof, can do so if he gives up all claims to further performance and the rights to compensation ; if it is not of the essence of the contract, specifc performance can be had, ss. 14 and 15 respectively of the Specific Relief Act apply and supplement the provisions of s. 55 of the Indian Contract Act on the point. Similarly, if *misdescription* is material and of a substantial character, specific performance will not be decreed. So a purchaser would not be compelled to take a freehold estate instead of copy hold, nor an underlease instead of an original lease;[1] but if the discription (mistaken) is such as can be the proper subject of compensation, specific performance may be had at the vendor's suit if he makes compensation to the purchaser. So can a purchaser compel specifc performance of what the seller can give with an abatement ; in that case he takes what interest the seller can give.[2]

Test—Is the difference slight, and a proper subject of compensation ? If so, specific performance will be enforced.[3] Partial performance is not compelled even at the suit of the purchaser where it would be unreasonable or injurious to the parties.

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1 Madely v. Booth, Deg. and S. M. 918.

2 Mc Queen v. Farquhar, 11 Ves. 467.

3 Arnold, 14 Ch. D. 270.

Prob.—P contracts to sell to R a piece of land measuring 1,000 acres as it appears in a plan shown to R; it afterwards turns out that P cannot make a good title to a strip of land measuring 40 acres. This small piece is a narrow strip but has a front on the main road and is valuable as building land. Discuss the claims of P and R to call for specific performance of the contract.

A.—Sections 14 and 15 of the Specific Relief Act govern the case. The decision would depend upon whether the piece of land measuring 50 acres was necessary for the enjoyment of the whole plot or was so important for the use and enjoyment of the remaining 950 acres that its loss might not be made good in money. If that is so necessary, specific performance cannot be decreed against R, but it would be as regards the 950 acres againt P on his relinquishing his rights to damages for the remaining 50 acres; however, if that is not so necessary R can enforce specific performance of 950 acres and have compensation for the rest. P also can get specific performance for 950 acres but shall have to give compensation for his inability to give 50 acres. It is for the court to determine the question, viz., whether the 50 acres were necessary for the enjoyment of the other acres.[1]

Time, when the essence of the contract—In England, prior to the Judicature Act of 1873, time was always of the essence of the contract *at law*; but was not invariably so *in equity*. Now both at law and equity, lapse of time is a bar to specific performance if:—

(1) It was originally expressly so stipulated.

(2) It was so from the nature of the transaction.[2]

(3) It was made so subsequently by a reasonable notice. Owing to fusion of law and equity, the

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1 Ayles, v. Cox, 16 Beav, 23; Madely v. Booth, 2 Deg. and Sim. 918.
2 Levy v. Sugden, (1899) 1 Ch. 5.

rules of equity on this subject prevail at law also. In India this, as said above, is governed by s. 55 of the Contract Act read with ss. 14–15 of the Specific Relief Act.[1]

(4) If delay is so great as to be evidence of abandonment of the contract.[2]

S. 13 of the Specific Relief Act and s. 56, Indian Contract Act, ditinguished —S. 13 of the Specific Relief Act says that notwithstanding anything contained in s. 56 of the Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter existing at its date has ceased to exist at the time of performance; thus if A contracts to sell a house to B for Rs. 1,000, and a day after the contract is made, the house is destroyed by fire, B may be compelled to perform his part of the contract by paying the purchase-money. This section, at first sight, seems to be in conflict with s. 56 of the Contract Act; but it is not really so. That section speaks of an agreement to do a thing impossible in itself or which becomes impossible afterwards by any causes beyond the control of the parties; while the object of s. 13 of the Specific Relief Act is merely to explain the bearing of the general rule as in s. 56 of the Contract Act upon a suit for specific performance. Further, s. 13 is limited to cases where an act has become impossible because part of the subject-matter has ceased to exist and does not extend to cases where it becomes unlawful.

This section does not lay down any rule as to the validity or otherwise of a contract. This section presupposes that the agreement must be one enforceable at law. This is not meant to enable a person to call upon another to do an act which he is not competent to do as being against public policy. The principle underlying this is that a party making

1 Seton v. Slade, 2 W. and T. L. C.

2 Miles v. Haywood, 6 Ch. D. 196.

an unqualified promise must stand by it. The effect is to throw the loss on the equitable owner. The principle would apply to a contract for the sale of shares in a company, which is afterwards wound up before the shares are actually transferred.[1]

Prob.—A contracts to sell B a horse for Rs. 500 to be delivered immediately. Discuss the legal position of the parties if (1) the horse dies after the date of contract, but before delivery; (2) if the contract contains a stipulation that in case of breach of the contract he will pay B Rs. 200 as damages.

A.—Sections 13 and 20 of the Specific Relief Act apply. Even if the horse dies, A can, under s. 13, sue B for specific performance of his promise; and, in the other case, even though the damages are liquidated, that fact does not operate as a bar to specific performance.

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1 Coles v. Bistow, L. R, 6, Eq. 149.

CHAPTER XXVIII.

The rights of a purchaser against a vendor with an imperfect title.—Liquidation of damages how far a bar to specific performance.—Who can and who cannot enforce specific performance.—Specific performance with a variation.—Against whom specific performance can and cannot be allowed.—Defences to a suit for specific performance.

Remedies against a vendor with imperfect title —Section 18 of the specific Relief Act concedes to a purchaser or lessee of property some rights against a vendor with imperfect title, thus :—

(1) If the vendor or lessor has, subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him, or a person claiming under him, to make good the contract out of such interest.[1]

(2) Where the concurrence of other persons is necessary to validate the sale or lease, and they are *bound* to convey it at the lessor's request, the purchaser or lessee may compel him to procure such concurrence. In England, the right subsists though the others are not bound.

(3) Where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee. This clause assumes that the vendor has represented the property to be unencumbered; the representation may even be implied. No relief under this clause can be allowed if the transaction between the parties is complete.

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1 Clayton v Duke of Newcastle, 2 C. C. 712.

(4) Where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his imperfect title, the defendant has a right to the return of his deposit with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let. See also s. 55, Transfer of Property Act. These rules are based on principles of English law.

This section does not deprive the buyer of his ordinary common law remedy of suing for damages.

Prob.—(*a*) A, believing the contrary to be the fact, that a certain piece of land has become his, executes a deed conveying it to B for money paid. Shortly after, the estate does come to A's possession and ownership. Has B any means of improving his position with regard to the ownership of the land ?

(*b*) A professes to sell to B a freehold estate free from all encumbrances; B discovers that the estate is mortgaged to C for the full amount of the purchase-money. Has B any right against A ?

(*c*) A agrees to sell to B a house in Poona ; B pays the deposit but afterwards objects to A's title and refuses to complete the transaction. A then sues B for specific performance of the agreement, but his suit is dismissed. Has B any right against A ?

A.—(*a*) Yes ; he can under s. 18 (*a*) compel A, the vendor with an imperfect title, to make good the title out of the interest he subsequently acquires.

(*b*) Under s. 18, cl. (*c*) of the Specific Relief Act, the purchaser B can compel A to redeem the mortgage and obtain a conveyance from C.

(*c*) Under the same section, cl. (*d*) B can recover his deposit, costs of the suit and interest, and he has a lien for

the above on A's interest in the house agreed by him to be sold to B.

Liquidation of damages no bar to specific performance—The fact that a sum is mentioned as the amount to be paid in case of its breach, and that the party in default is willing to pay the same, is not a bar to specific performance, if the contract is otherwise proper to be specifically enforced. Thus, if A contracts to grant B an underlease of property held by A under a third person C, and that he will apply to that third person C for a license necessary for its validity, and that if the license is not procured, he (A) would pay B Rs. 100 as damages; in this case, if A refuse to apply for the license even though he offers to pay damages, B may sue to have the contract specifically performed, provided C consents to give a license.[1]

This section embodies the modern general rule of equity, that a thing ought to be done though penalty or liquidated damages are mentioned. But this section will not apply where compensation in money would be adequate relief.

For whom contracts can be specifically enforced (s. 23)—

Specific performance of a contract may be enforced in favour of:—

(1) A party thereto.

(2) Representative in interest, or the principal (though undisclosed) of any party thereto; but not if the case falls under cl. (2) of s. 21, or there is a provision in the contract that his interest shall not be assigned unless where his part of the contract has already been performed.

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1 French v. Macale, 2 Dr. and War. 279.

(3) Any person beneficially entitled (when the contract is a settlement on marriage or a compromise of doubtful rights between members of the same family).

(4) The remainderman (when the contract has been entered into by a tenant for life in due exercise of a power). For explanation of terms, see Appendix A.

A remainder is an ulterior estate limited to take effect and to be enjoyed after a prior estate is determined, both estates being created at the same time. It arises out of express grant; the person taking such estate is a remainder-man; reversion is something different arising by implication. It is the residue left in the grantor to come into possession after the determination of a particular estate.

(5) A reversioner in possession (when the agreement is a covenant entered into with his predecessor in title, and the reversioner is entitled to the benefit of such a covenant).

(6) A reversioner in remainder (when the agreement is such a covenant and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach).

(7) The amalgamated company (if a public company has entered into a contract and has subsequently become amalgamated with another public company).

(8) The company (when its promoters have, before its incorporation, entered into a contract for its purposes—if the contract is warranted by the terms of its corporation), s. 23.

This does not apply to contract to take shares but only to contracts for the working purposes of the company; the promoters are not the agents of the company before its formation.[1]

1 Imperial Ice Co v M·nchershaw. 13 Bom. 414.

Specific performance cannot be enforced in favour of—

(1) One who could not recover compensation for its breach.

(2) One who has become incapable of performing or violates any essential term of the contract, that on his part remains to be enforced, e. g., insolvency.

(3) One who has already chosen his remedy and obtained satisfaction for the breach (e. g., recovered compensation).

(4) One who (before the contract) has notice of the settlement of the subject-matter thereof having been made. It is immaterial even if it is founded on a valuable consideration ; it is enough if it is in force. It must be an executed settlement and not executory. This clause protects a settlement as against a subsequent purchaser for value with notice of the settlement; whereas s. 25 (*c*) protects it as against the settlor himself by refusing him specific performance of his subsequent contract for value with a third person.

(5) A vendor or lessor of movable or immovable property—

(*a*) who knowing himself not to have any title to the property has contracted to sell or let the same;[1]

(*b*) who cannot give a title free from reasonable doubt, though he entered into the contract believing that he had a good title. The title which the purchaser may require is only such title as the conditions of sale entitle him to, and where the title depends for its validity upon

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1 Lawrie v. Lees. 7 [illegible]. C. 19.

proof of the seller not having had notice himself of an encumbrance when he completed his own original purchase, the title is " a good holding title" ;

(*c*) who (before the contract) had made a settlement of the subject-matter thereof even though it be not founded on a valuable consideration (ss. 24–25).

Prob.—A, in consideration of natural love and affection, settles an estate on B and C, his children. Subsequently he enters into contract with D to sell the estate to him for value. Has B any means of stopping the completion of the sale to D ? Can A enforce the contract against D ? Has A any defence against D's suit for specific performance ?

A—B can apply for an injunction against A, stopping the sale to D (s. 54 (*a*)) for A was, after the date of the settlement, a trustee for B and C. A himself cannot enforce specific performance against D, for at the time of the sale to D he knew that he had no title to the property because of the settlement in favour of B and C. He could not pass a title and so is debarred from suing for specific performance under s. 25, (*a*) and (*c*).

But against D's suit for specific performance, A can plead that at the time of entering into the contract D was aware of the settlement on B and C ; and if A prove this, D's suit must fail. (s. 24 (*d*).)

Prob.—A, the owner of certain immoveable property, mortgages it to B. A and B join in conveying the property to C ; the conveyance is not registered but C enters into possession. A dies leaving a will, of which B is appointed sole executor but no probate is taken out. Subsequently D contracts to purchase the property from C. Can C specifically enforce this contract ?

A.—No ; C cannot specifically enforce the contract. No probate having been taken out, C could not give a title free from reasonable doubt ; s. 25 requires a vendor to be able to give a good title in order to enable him to ask the court to enforce the contract.[1]

When contract cannots be specifically enforced except with a variation—Section 26 makes provision for cases where, if a defendant sets up a variation in defence of the plaintiff's suit for specific performance, it will be had only with the variation so set up, viz.:—

(1) Where, by fraud or mistake of fact, the contract (of which specific performance is sought) is in *terms different* from that which the defendant supposed it to be when he entered into it. The contract must be a complete one and not merely contingent.

(2) where, by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable *misapprehension as to its effect* as between himself and the plaintiff.

(3) Where the defendant, knowing terms of the contract and understanding its effect, has entered into it relying upon some *misapprehension by the plaintiff* or upon some stipulation on the plaintiff's part which adds to the contract, but which he refuses to fulfil.

(4) Where the *object* of parties was to produce a certain legal result which the contract as framed is not calculated to produce.

(5) Where the parties have, subsequently to the contract, contracted *to vary it.*[2]

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1 Haji Mitha v. Mussaji, I. L. R. 15 Bm. 657.

2 Woolam v. Hearn, 2 W. and T. 573; Lord Townshend v. Stangroom, 6 Ves, 328.

In such cases the plaintiff has to elect between having his action dismissed or having judgment with the variation set up. The contract must be one and in writing.[1]

For details as to scope and principle of this section see the judgment of Tottenham, J., in *Narain Patro's* case.[2]

There is difference between a plaintiff seeking and defendant resisting specific performance.

The difference as observed in the leading cases stated above is this :—A plaintiff seeking specific performance cannot himself adduce parol evidence in order to obtain that with a variation ; but the defendant resisting it can go into parol evidence to show that by fraud, mistake of fact, etc., the written agreement does not express the real terms (see s. 26).

Prob.—A entered into an agreement with B to hold his lands on lease ; B the lessor filed a suit for specific performance of written agreement for a lease with a variation as to the quantity of land to be included in the lease supported by oral evidence. A, the lessee, files a cross suit for specific performance of the written agreement simply. Which of these suits will succeed ?

A.—B, the lessor, will not succeed in his suit, for a plaintiff seeking specific performance with a variation cannot go into parol evidence to show that by mistake the written agreement does not express the real terms. A, the lessee, will not succeed fully, for B in order to resist the suit for specific performance brought by A, can go into parol evidence to show that, by mistake or surprise, the written agreement did not contain the terms intended to be introduced into it. As observed in English cases, this is the distinction between a plaintiff seeking specific performance with varia

1 Ramsbottom v. Gosden, I. V. and B. 130.
2 12 Cal. 152.

tion and the defendant resisting it similarly; oral evidence can be adduced in the latter case and not in the former.[1] The student is advised to read the case of Woolam *v.* Hearn, noted below.

Prob.—By a written contract A sold to B an estate P, and B sold to A an estate R; on the face of the contract the sales appeared to be separate and not dependent upon each other; the title of A to the estate P failed; still he wanted to enforce the sale to him of the estate R; B comes to you for advice.

A.—The only point to be decided is whether it can be shown by oral evidence that an exchange only was intended; cl. (*b*) to s. 26 speaks of a case where there is fraud, mistake of fact or surprise; in this case the contract apprears to have been entered into by A and B deliberately with open eyes and they cannot be said to have been influenced by mistake or surprise; the parties understood also the legal effect of the contracts they had entered into, and so cl (*b*) of that section would not allow of the parol variation being set up; the sale would therefore be enforced.[2]

The persons against whom contracts may be enforced:—

(1) A party thereto.

(2) A person claiming under him by a title arising subsequently to the contract; except a transferee in good faith for value and without notice.

(3) A person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant.

1 Woolam v. Hearn 2 W, and T. L.-C.; 513; Lord Townshend v. Stangroom, 6 Ves. 328.

2 Croome v. Lediard, 2 My. and K. 251.

(4) The amalgamated company, where the public company which has entered into a contract becomes amalgamated with another public company.

(5) The company where the promoters thereof have before its incorporation entered into a contract warranted by the terms of the incorporation and ratified and adopted by the company (s. 27).

Against whom not enforced—A contract cannot be enforced against a person under circumstances mentioned in s. 28, e. g., when consideration is grossly inadequate, consent has been obtained by misrepresentation, concealment, circumvention, unfair practices of the other party, or assent is given under mistake of fact, misapprehension or surprise.

Prob.—A purchased an estate at an auction under a mistake as to the lot put up for sale, but it is found that the mistake of A arose solely through his own carelessness. B, the auctioneer, sues for specific performance. Can A resist this suit ?

A.—Yes ; under s. 28 (*c*), mistake of fact can be set up as a defence ; it is immaterial that the mistake is owing to A's own negligence ; B can have compensation in the shape of damages for the loss suffered by him owing to A's refusal to perform the contract ; specific performance would be refused though a claim for damages against A would be decreed.[1]

Defences to an action for specific performance—(1) That the circumstances of the case are such as to give the plaintiff unfair advantange over the defendant, though there is no fraud or misrepresentation (s. 22).

(2) That specific performance would involve a great

1 Malins v. Freeman, 2 Keen, 25.

hardship on the defendant if enforced, and would not involve such hardship on the plaintiff if not enforced (s. 22).[1]

(3) That the plaintiff has not performed the whole of his part of the contract, and that the part left unperformed, forming a considerable portion of the whole, does not admit of compensation in money (s. 14).

(4) That time was of the essence of the contract, and the stipulation is broken.[2]

(5) That the misrepresentation of the subject-matter was material and substantial (ss. 14-15).[3]

(6) That the plaintiff could not give a title free from reasonable doubt (s. 25).[4]

(7) That the plaintiff had already chosen his remedy or thát he could not recover compensation for the breach, or that he failed to perform an essential term of the contract that remained on his part to be performed (s. 24).

(8) That he had previously to the contract known that a settlememt of the subject-matter was made and was in force (s. 24).

(9) That the consideratian to be received by him was very grossly inadequate (so as to be evidence of undue advantage taken by the plaintiff), s 28 (*a*).

(10) That his assent to the transaction was given under influence of mistake of fact, misapprehension or surprise, s. 28 (*b*).

(11) That his assent was obtained by misrepresentation, (innocent or wilful) concealment, unfair practices of the other party.

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1 Fry v Lane, 4 Ch. D. 812.

2 Lancaster v. Wilson, (1897) 1 Ch. 711 ; Setton v. Slade, W. and T.

3 Wanton v. Copard (1899) 1 Ch. 97.

4 Scott v. Alvarez, (1895) 2 Ch. 603.

(12) That the contract came under any clauses in s. 21 which could not be specifically enforced.

(13) A variation may be pleaded under s. 26.

(14) That there was want of mutuality ; but it is not a defence in India.[1]

Mistake how relieved.—(1) Specific performance may be had with a variation (s. 26).

(2) Specific performance may not be had against a person if the assent was given under a mistake of fact (s. 28).

(3) Rectification of the instrument can be had if it is mutual ; oral evidence is admissible to prove the mistake (s. 31).[2]

(4) Rescission of a contract may be allowed (s. 35).[3]

(5) Cancellation of the instrument would be ordered (s. 39).

The above are some of the ways in which relief is given in case of mistake of a contracting party. It may be a common mistake of both parties or one induced or contributed to by the plaintiff. In *Mallins* v. *Freeman*,[4] mistake of itself was allowed as a defence.

Damages and specific performance—A person suing for specific performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for such performance. The court has the discretion to grant either relief or both (s. 19).

The court can award compensation for the breach of the contract ; the mere circumstance that the contract is

1 Flight v. Bolland, 4 Russ. 301 ; Krishnasami v. Sundrapayar, 18 Mad.
2 Clivan, 1 Sch. and Lef. 39.
3 Taplin v. Jones, 15 Ch. D. 215.
4 2 Keen, 34.

incapable of specific performance will not preclude the court from exercising its jurisdiction to award damages. In England, similarly, the court has the power under the Judicature Act.[1]

Effect of dismissal of a suit for specific performance—The party whose suit is dismissed is barred from bringing any suit for compensation for the breach of the contract (s. 29).

Enforcing awards—Awards and wills are specifically enforced just like contracts, and ss. 12 to 29 of the Specific Relief Act apply (s. 30).

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1 Jackes v. ... 53

CHAPTER XXIX.

Rectification — Rescission — Cancellation — Declaratory Decrees—Receivers.

Rectification—Rectification is entirely at the discretion of the court ; in order to get this relief it is necessary that the mistake (either of fact or law) should be *mutual* or that there should be fraud,[1] and such fraud or mistake must have resulted in the contract or other instrument in writing, not truly expressing the intention of the parties. Either party or his representative in interest may institute such a a suit ; but the court will interfere only on a clear proof of the fraud or mutual mistake, and after ascertaining the real intent of the parties ; it must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement ; the court will than rectify the instrument so as to express the true intention so far as that can be done without prejudice to the rights acquired by third parties acting in good faith and for value. Thus, there can be no rectification against a purchaser for value without notice. In order to ascertain the true intention of the parties, the court may inquire as to what the instrument was intended to mean and what were intended to be its legal consequences; the court is in no way to confine to the inquiry as to what its language was intended to be. This is treated in ss. 31-34 of the Specific Relief Act.

(*i*) It has to be noted that the mistake must be mutual ; if it is that of one of the parties only, it will be a ground not for rectification but rescission under s. 35 or for setting up a variation under s. 26.[2]

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1 Amanat Bibi, 14 Cal, 308

2 Wilding v. Sanderson, (1897) 2 Ch. 514.

(*ii*) The maxim "He who comes into equity must come with clean hands" applies ; i. e., both parties must be innocent, i. e., did what neither of them intended to do.

(*iii*) The relief is not limited to contracts only ; any instrument in writing, e.g., wills, deeds, can be rectified.

(*iv*) If the original agreement is ambigous, extrinsic evidence is admissible to ascertain the true intention of the parties.

(*v*) This section does not apply to intentional omissions.

(*vi*) The word " intention " means, intention as to the meaning and legal effect of the instrument and not merely as to the language in which they are to be expressed.

(*vii*) Section 32 is limited to rectification of contracts in writing,

(*viii*) A rectified contract can be specifically enforced if it is so prayed for in the plaint.

Prob.—A sold a plot of land to B; and the necessary deed was drawn up ; the deed perchance happened to include more land than A intended to sell ; but this was due to the mistake of A rather than that of B ; A brought a suit for the rectification of the deed which B opposes. Decide the case on the contentions of A and B.

A.—S. 31, Specific Relief Act, allows rectification only when the mistake is mutual ; in this case the mistake is unilateral, i. e., on the part of A only ; so A cannot successfully claim rectification ; but the court can act under s. 26 and allow a parol variation to be set up by A, i. e., décree specific performance subject to the variation, or under s. 36 it can allow A to rescind the contract altogether.[1]

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1 Harris v. Peperell, L. R. 5 Eq. 1 ; Bloomer v. Spittle, L. R. 13 Eq. 427 ; Mahomed v. Chaturputsing, 20 Cal. 859.

When a contract can be allowed to be rescinded—S. 35 of the Specific Relief Act, empowers a court of equity to adjudge rescission of a contract (at the suit of any person interested in the contract in writing for its rescission)[1]:—

(1) If the contract is voidable or terminable by the plaintiff, i. e., in case of a contract induced by coercion, undue influence, fraud, misrepresentation, under ss. 15-18 (Indian Contract Act). It must be terminable by the plaintiff only and not by both the parties, i. e., it must not be void altogether. A contract is said to be terminable when it reserves to the contracting parties—one or both—a power in certain specified circumstances to rescind the contract.

(2) If the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff , the accident, mistake or fraud which is pleaded, must be such as would go to the bottom of the contract radically affecting its merits and not such as to admit of a rectification.

(3) If the decree for specific performance of a contract of sale, or of a contract to take a lease, has been made and the purchaser or lessee makes default in payment of the purchase-money or other sums which the court has ordered him to pay (when the purchaser or lessee is in possession of the subject-matter and the court finds that such possession is wrongful, the court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor, and in the same case the court may, by order in the suit in which the decree has been made, and not complied with, rescind the contract either so far as regards the party in default or altogether as the justice of the case may require).

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1 Harris v. Peperell Supra ; Paget v. Marshall, 28 Ch. D. 255.

This is at the discretion of the court and not obligatory upon it; the mere fact that the requirements of the section are specified is not conclusive. If it thinks proper, it may award compensation to the other party and ask the person in whose behalf it is so rescinded to pay the same. A party may, in his suit for specific performance, put a prayer for rescission in the alternative (ss. 35, 38, Specific Relief Act).[1]

(*i*) *Inadequacy of price, how far a defence*—Mere inadequacy of price is not of itself a defence to a suit for specific performance or a ground for rescission of the contract. Section 28 (*a*) requires that, in order to be a valid defence, it must be so grossly inadequate (with reference to the state of things existing at the date of the contract) as to be by itself, or coupled with other circumstances, evidence of fraud or of undue influence taken by the plaintiff.

(*ii*) Clauses (*a*) and (*b*), s. 35, are general and apply to all contracts. Clause (*c*) is limited to two kinds, viz., contracts of sale or contracts for lease; the ground of relief in cl. (*c*) is different.

(*iii*) Section 36 is limited to cases where there is rescission on the ground of mistake only; it is not allowed unless parties can be put in *status quo*.

(*iv*) If the case falls under any of the three clauses in s. 35, rescission is allowed even without the consent of the other side. There cannot be rescission of a part.

(*v*) Rescission must be within three years as provided for by Article 114 of the Limitation Act, the period running from the time the plaintiff came to know of circumstances entitling him to the relief.

Prob.—X agrees to sell his estate to Y for Rs. 5,000. Y pays Rs. 3,000 and is let into possession of the property;

1 Hari v. Naro, 18 Bom, 342.

Y, however, fails to pay the balance of the purchase-money. Advise X as to his legal position.

A.—X can, under s. 35, cl. (*c*) of the Specific Relief Act, bring a suit for rescission of the contract ; this prayer may be the main relief or may be an alternative one if the suit is for specific performance of the contract to pay the balance. Ordinarily, the vendor brings a suit for recovery of the balance in the shape of a claim for specific performance. The decree in such a case fixes the time and place of the payment of the balance of the unpaid purchase-money ; on non-payment within the fixed time, the court making the decree is to be moved, and the rescission of the contract is asked for. The court then passes the neeessary order.

Prob.—A went through a form of marriage with B which both of them knew to be invalid ; before going through the ceremony, A made a settlement which was good on the face of it but was really in consideration of the fictitious marriage, of certain property upon B ; they then lived together as husband and wife, but after A's death, his representative seeks to set the settlement aside and comes to you for advice.

A.—Both A and B are *in pari delicto.* A had participated deliberately in the form of marrige known to him to be invalid, and the agreement was founded on equally immoral conduct on his own part ; and so he, if living, would not have been able to get it set aside, but would have been left to take the consequences of his own iniquity ; and what A could not do himself, it could not be done by his representative who stands in his shoes. Naturally, therefore, C would not succeed in his efforts to set aside the deed which must remain binding upon him.[1]

Cancellation of an instrument (ss. 39-41)—This

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[1] Ayerst v. Jorkins, L. R. 12 Eq. 275.

relief, equally as rectification, is in the discretion of the court. The written instrument sought to be cancelled must be void or voidable against the plaintiff. Such a person may sue to have the instrument adjudged void or voidable and get it delivered over to himself or cancelled. He must, however, satisfy the court that the instrument, if left outstanding, may cause him serious injury or that he had reasonable aprehensions[1] thereof. The court has the discretion even to cancel an instrument in part and allow it to stand for the residue if the instrument evidences different rights and obligations (s. 40). It may, if it is necessary for the ends of the justice, require the plaintiff to make compensation to the other party (s. 41). This relief is granted by the courts of equity on the principle of *quia timet* to prevent and avoid anticipated mischief or wrong ; the reason being that if not so cancelled, the instrument would, after a lapse of time when the evidence of its voidable character is no more abtainable, perhaps be vexatiously used by one party against the other innocent party[2] (ss. 39-41).

(*i*) *Essentials of refief*—The plaintiff must prove:-

(*a*) That the instrument is void or at least voidable against the plaintiff.

(*b*) That he has reasonable apprehension of injury from the instrument if left outstanding.

(*c*) That the threatened injury is serious.

(*d*) that the case is such that the court ought to exercise its discretion and cancel the document.[3]

(*ii*) It must be done within three years under Article 91 of the Limitation Act.[4]

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1 Kotrabassappaya, 23 Bom. 375.

2 Mann Singh v. Panday, 12 All. 523; Mohimchunder v. Jughul Kishore, 7 Cal 736. Jeka Dula v Bai Jivi 39 Bom. L. R. 1072.

3 Vali v. Dalu, 25 Bom. 10.

4 Bakatram, 72 Bom 560.

(*iii*) Rescission can be ordered in case of a contract being voidable only ; while cancellation can be had in any case i.e., whether the instrument is void or voidable ; and it is sufficient if there is a reasonable apprehension of the danger.

Declaratory decrees—Section 42 of the specific Relief Act makes provision for a particular mode of rilief, where there is no specific performance, no award of compensation ; but there is merely a declaration of the rights of parties. Thus when a person denies or is interested in denying the title of another person to any legal character or to any right as to any property, to which said character or right that other is entitled, that other person may institute a suit against the former, and the court will then, in its discretion make a declartion that he is so entitled ; in such a suit the plaintiff need not ask for any further relief ; but if the plaintiff, being able to seek any further relief than a mere declaration of title, omits to do so, the court shall not pass any such declaration, i. e., there should not be further consequential relief open to the plaintiff.

Such a decree is binding only on the parties to the suit and the persons claiming through them respectively, and where any of the parties are trustees, persons for whom they are trustees. There can be no execution of a declaratory decree.

Essentials—In order to get a declaratory decree it is necessary that :—

(1) There must be a present existing interest, however distant the possibility of its coming into actual possession and enjoyment may be ; a mere contingency, however proximate and valuable, if by virtue of it there is no present state of interest, will not suffice.[1]

1 Wajid Ali, 8 All. 3

(2) There must be some present danger or detriment to such interest to be avoided by the declaration; it must not have been sought on merely speculative grounds.

(3) A man who is able to seek further relief than a mere declaration of title, cannot be allowed a declaratory decree only if he omits to seek that further relief. (*Collett.*)

(*i*) This section is designed for the purpose of making clear that which is at present doubtful and which it is necessary to make clear. The decree creates no new right; it only declares what was plaintiff's right before.

(*ii*) Even if the three essentials mentioned above are present, the decree cannot be claimed as a matter of right; it is discretionary with the court.[1] It will not make a declaration if all the parties are not joined.[2]

(*iii*) The proviso to the section does not empower a court to dismiss a suit merely because the plaintiff being able to seek further relief fails to do so; the court can only refuse to make the declaration.[3]

(*iv*) In granting a declaratory decree, when no consequential relief is claimed, the court should exercise its discretion with great caution. All that the proviso to s. 42 forbids is a suit for pure declaration without further relief. It does not compel a plaintiff to sue for all the relief which could possibly be granted or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want. It contemplates only 'a further relief' which could be claimed against the defendant only and not one which could be claimed against anybody

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1 Gopal Kunwar, 26 All.
2 Maharajah of Benaras, 27 All. 136.
3 Kunjbehari v. Keshalal, 28 Bom. 537.

else.[1] "The object of the Legislature was to grant to the plaintiff a relief granted by the Court of Chancery in England in cases where no relief at common law was available. The proviso refers to the position of the plaintiff when he commenced his suit, and is applicable only to such relief as is appropriate and consequent on the right asserted. The words 'further relief' mean the further relief in relation to the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying." (*Collett.*)[2]

Prob.—A is related to B, a Hindu widow, and, as her reversioner, is likely to take her property on her death ; A assigns his right to C. C wants to get a declaration as to his rights through a decree of the court and comes to you for advice.

A.—No ; he cannot get. S. 6 of the Transfer of Property Act prohibits the transfer of an expectancy by a presumptive heir ; so C, having no interest, can get no declaration under s. 42, Specific Relief Act. The student may consult :

(1) *Kathama Natchiar* v. *Dorasing*, (1875) 2 I. A. 169.

(2) *Sheoparsansingh* v. *Ramadanan*, 43 I. A. 91.

(3) *Deopali Koer* v. *Kedar Nath*, 39 Cal. 704.

Appointment of receivers—This is a relief meant for the protection of property. A receiver can be appointed of any property, movable or immovable, e.g., shares in companies, lands, inami villages, stock-in-trade, etc. *It is* a matter resting in the discretion of the Court. The mode and

1 Humayun Begum v. Md. Khan A. I. R. 1943 P. C. 94.

2 Fakirchand v. Anandachander, 14 Cal. 586 ; Sardarsingbji, v. Ganpatsinghji, 14 Bom. 395 ; Kanan v. Krishna, 13 Mad. 327.

effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure. It is provided by the Code of Civil Procedure that: where it appears to the Court to be just and convenient, the Court may by order—(a) appoint a receiver of any property, whether before or after decree; (b) remove any person from the possession or custody of the property; (c) commit the same to the possession, custody or management of the receiver; and (d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit. It is further provided that nothing in the rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

He is liable for loss occassioned to the property by his wilful default or gross negligence. A receiver stands in a peculiar position, for in his case want of ordinary diligence would be taken as amounting to gross negligence.

To protect the property in his hands against loss, security is generally taken from the receiver. He has to account for what he receives in respect of the property and pass his accounts at such period and in such form as the court directs (s. 44, Specific Relief Act; see Order 40 of the Civil Procedure Code).

English law—He may be appointed on the application of any party and even after a judgement in the case, if the same remains unsatisfied, or at the instance of a mortgagee

in possession. This wide latitude is given to the courts after the judicature Act of 1873.

It can do so whenever it appears to it just and convenient ; and the appointment may be unconditional or upon certain terms ; but in making the appointment the court is to have regard to the amount of the debt, the amount which he will probably recover and the costs of his appointment. He is to be regarded as an officer of the court and has to keep regular accounts as prescribed ; and has also to furnish security ; but in urgent cases he is exempted.[1]

Jurisdiction of a court to enforce performance of public duties—This is of the nature of *mandamus* (in England). Ss. 45-51 of the Specific Relief Act lay down a string of rules governing the jurisdiction of the courts in enforcing performance of public duties, and the procedure for such a relief, thus:—

> Any of the High Courts at Fort William, Madras, and Bombay can make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction by any person holding a public office, temporary or permanent, or by any corporation or any inferior court of judicature. Such act or forbearance must be clearly incumbent on such public officer or court or corporation under any law for the time being in force, and must, in the opinion of the High Court, be consonant to right and justice. Further, the applicant (to the satisfaction of the court) must have no other specific and adequate legal remedy, and the remedy given by the order applied for must be such as would be complete.

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1 County of Gloucester v. Audry, (1895) 1 Ch 629.

The application must have been made by some person whose property, franchise or personal right would be injured by the forbearing or doing of the said specified act. It must be founded on affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial of his right.

Procedure—The High Court may make the order absolute in the first instance or refuse it or grant a *rule nisi* to show cause why the order applied for should not be made, or it may make an order in the alternative; lastly, if no cause is shown, it may make a final peremptory order to do the act or forbear from it absolutely. The costs are in the discretion of the court. An appeal lies from such an order.[1]

(*i*) It is only the High Courts that can exercise this prerogative, and that too only when there is no other specific and adequate remedy; thus a court would refuse to interfere under this chapter on the application of a purchaser of shares in a company, whom the directors refuse to register as a shareholder for he has a remedy open under s. 58, Indian Companies Act[2], but it would interfere to restrain a person who is not duly elected from exercising the functions of a duly elected Municipal Commissioner.

(*ii*) The High Court cannot, under s. 45, make any order binding on the Government, i.e., Secretary of State, Viceroy, and Governors of Madras or Bombay, Lieutenant-Governor of Bengal, nor make an order on any servant of the Crown as such, merely to enforce the satisfaction of a claim upon the Crown.

(*iii*) The powers conferred are very similar to those exercised through the old prerogative writ of *mandamus* in

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1 In re Corkhill, I. L. R. 22 Cal. 717.

2 In re Bombay Insurance Co., I. L. R. 16 Bom. 328.

England, the object being the enforcing of public duties. But it may be noted that the Section 45 of the Specific Relief Act does not in terms deal the writ of mandamus. On the contrary it is laid down in Section 50 of the same Act that neither the High Court nor any Judge shall hereafter issue any writ of mandamus.[1] It may further be pointed out that the conditions laid down in s. 45 are cumulative. They must all be fulfilled before an order is passed under the Section.[2]

(*iv*) The application ought not to be premature nor unreasonably delayed. An impossible act will not be ordered; in England it is not granted to deprive a person of an office; but in India it would perhaps be allowed.[3]

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1 Lady Dinbai v. Noronha 48 Bom. L. R. 255.
2 De'Souza v. The Reserve Bank of India. 48 Bom. L. R. 365.
3 4 Mad. 233.

CHAPTER XXX

How preventive relief is granted.—In what cases a Court abstains from granting an injunction.—Restraining breach of negative covenants if the affirmative part cannot be specifically enforced.—Different kinds of injunctions.—When perpetual injunction is granted..—Mandatory injunction.—Illustrations.

Preventive relief—Preventive relief is granted by an injunction enjoining the other party to refrain from doing that which he is under an obligation not to do. It is entirely at the discretion of the court. An injunction may be temporary or perpetual as also mandatory. It is a mode of specific performance of negative agreements. In England, before the Judicature Act, 1873, cases in which equity would interfere by injunction were classed under two heads : (*i*) to prevent the iniquitous institution or continuance of judicial proceeding, or (*ii*) injunction to restrain wrongful acts *in pais*, i.e., unconnected with judicial proceedings ; but now it can be done in all cases where it appears to the court that it is just or convenient that the order should be made irrespective of the plaintiff or defendant being in possession [1]

When injunction will not be granted—Section 56 of the Act gives general cases in which injunction is refused. In other cases, even it is not obligatory on a court to give an injunction ; it has to exercise its discretion, regard being had to the merits of each case.

It will not be granted :—

(1) To *stay a judicial proceeding* pending at the institution of the suit in which injunction is necessary to prevent a multiplicity of proceedings. In England, too, the courts of

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1 Lowndes v. Bettee, 10 J. N. S. 226.

Chancery have two similar prerogatives : (*i*) to stay proceedings at law, (*ii*) jurisdiction in bills of peace.

(2) To stay proceeding in a court not subordinate to that from which injunction is sought.[1]

(3) To restrain persons from applying to any legislative body.

(4) To interfere with the public duties of any department of the Indian or Local Government or with the sovereign acts of a foreign Government.

(5) To stay any *criminal proceedings.*

(6) To prevent, the breach of a contract the performance of which will not be specifically enforced (s. 21)

(7) To prevent on the ground of *nuisance*, an act of which it is not reasonably clear that it will be a nuisance; if the court is satisfied that the act complained of will inevitably result in a nuisance, it would interfere to restrain the act before the actual nuisance has been committed. No relief, by way of injunction, can be given for an imaginary or problematic injury.

(8) To prevent a continuing breach in which the person seeking an injunction has acquiesced, there should be no laches ; if there is unnecessary inexplicable delay in applying for it, the maxim " Delay defeats equities " prevails. Thus, if a man's neighbour is building over his own land but in such a way as to infringe his rights of easement to light and air, the action must be brought at the earliest opportunity, and if he waits till the whole building is completed, he will lose his right to the relief.[2] Acquiescence bars injunction but not the right to compensation.[3]

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1 Appan v. Raman, 14 Mad. 422.

2 Jamnadas v. Atmaram, 2 Bom. 138.

3 Lindsay Petroleum Co., L. R. 5 P. C. 239.

(9) When equally efficacious relief can be had by other usual proceedings (except in the case of breach of trust).[1]

(10) If the applicant does not come with clean hands, i.e., if he is guilty of such conduct as disentitles him to the assistance of the court.

(11) When he (applicant) has no personal interest in the matter, i.e., he is a nominal plaintiff, others having actual interest in the suit.

For detailed discussion on this subject the reader is referred to *Woodroffe* on Injunction, p. 112.

Prob.—Will a court of equity grant an injunction in any of the following cases :—

(*a*) A died leaving a will whereby he left all his property to B after providing for his wife's maintenance. However, after A's death, C announced her intention to adopt a son to her husband, and a particular day was fixed for the adoption. B comes to court for an injunction restraining C from adopting.

(*b*) A builds a house with eaves projecting over B's land ; three months after that, B comes to court for a mandatory injunction.

(*c*) A manufactures and sells crucibles, designating them patent plumbago crucibles, though in fact they were not patented. B sells his own crucibles as patent plumbago crucibles. A comes to court for an injunction against B.

A.—(*a*) No ; it has been held by the Bombay High Court[2] that an injunction to restrain an adoption cannot be granted. The injury to B would be only problematic ; it is not certain that the adoption, if performed, would deprive B of his rights under the will.

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1 Wallis v. Earl of Shaftesbury, 7 Ves. 487.

2 Assur Purshotam v. Ratonbai, 13 Bom. 56.

(*b*) A mandatory injunction is entirely in the discretion of the court, turning upon the facts of the particular case. If the court holds that the interval of three months between A's building and B's coming to court is *laches* on his part, injunction will not be granted; but if it be held on the particular facts that B came to court on the earliest opportunity, B will have a mandatory injunction against A.[1]

(*c*) No; the rule is "he who comes into equity must come with clean hands." The plaintiff's own crucibles were not patented and he put them forth as patented. There can be no property in such falsehood. His own conduct is such as to disentitle him to the assistance of the court. Injunction will, therefore, be refused.[2]

Prob.—A and B, both of Bombay, owned houses adjacent to one another, and in the side of A's house, abutting on B's premises, were several windows which were ancient lights. B, having pulled down his old house, commenced to build a new one in such a manner as would cause a great diminution of the light which entered the windows referred to above, but owing to other windows in front and rear of the house such diminution of light would not materially affect plaintiff's comfort in the use of his house. What relief will A be awarded?

A.—The decree will be for damages only. The Bombay High Court[3] has laid down the principles to be observed by the courts in granting injunction in light and air cases. For an injunction, it is necessary that the plaintiff's light should have been substantially diminished by the new building, and that the building should have been rendered unfit for

1 Holland v. Worley, 26 Ch. D. 578; Jamnadas v. Atmaram, 2 Bom. 133.

2 Morgan, 36 L. J. Ch, 228.

3 Dhunjibhai Omrigar v. Lisboa, 13 Bom. 257; Ghanasham v. Moroba, 18 Bom. 474.

the purpose for which it might reasonably be expected to be used. In this case the interference does not appear to be so large, material and substantial inasmuch as the windows in the front and rear of the house do bring in sufficient light. The plaintiff can therefore get damages only.

Restraining breach of negative covenants—Section 57 says that "notwithstanding anything mentioned in s. 56 (above), when a contract consists of affirmative and negative covenants, i.e., to do a certain act and restrain from doing something, the mere fact that the court cannot compel specific performance of the affirmative clause, shall not preclude it from granting an injunction against the breach of the negative covenant; but this is restricted by the proviso, viz., that the applicant must not have himself failed to perform his part of the contract. The affirmative and negative covenants must be distinct and separate, and each of them should be substantive parts of the contract. So, if the negative clause is merely subsidiary or incidental to the affirmative part, the former will not be enforced by an injunction. Again, they should not be correlative to each other so as to be inseparable. The court has to be satisfied that they are distinct. It should be noted that this section is not subject to the provisions of s. 21, cl. (9); under this section an injunction may be granted even in case of a contract of a longer duration—even exceeding three years, though it might not be capable of specific performance under s. 21.[1]

(*i*) To entitle the applicant to an injunction restraining the breach of a negative covenant when the positive one cannot be specifically enforced, the following are the necessary essentials :—

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1 Madras Ry. Co. v. Rust, 14 Mad, 180; Lumley v. Wagner, 1 De, G. M. and G. 604; Hills v. Croll, 2 Ch. 60; Callianji v. Nursi, 19 Bom, 764.

(*a*) the agreements; (*b*) divisible; (*c*) the negative one may be express or implied; (*d*) the applicant must not have failed to perform his part of the contract.

(*ii*) It is not necessary that the inability of the court to enforce specific performance of the affirmative part must have arisen in a particular manner.

Prob.—A signed an agreement in England with B, whereby he contracted to serve B exclusively in India for 4 years under a penalty of Rs. 1,000. A having served for one year quitted B's employ without any reasonable cause. Has B any remedy under the Specific Relief Act against A?

A.—A's contract of personal service cannot be specifically enforced (s. 21, cl. (2)); however, the contract consists of both affirmative and negative covenants—affirmative, i.e., to serve B for a certain period, and negative, i.e., to serve him exclusively and not anyone else. The affirmative clause is distinct and separate from the negative clause, and B has not failed to perform his part of the agreement. An injunction can therefore (under s. 57) be granted to restrain A from the breach of the negative covenant.

Further, according to s. 20, liquidation of damages, i.e., Rs. 1,000 penalty, is no bar to specific performance of the negative part if B is willing to retain A in his service.

The student should carefully read illustration (*d*) to s. 57. 36, Cal. 354, perhaps goes too far. See the case of *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416, 426, 432.

Difference between temporary and perpetual injunction—A temporary injunction is provisional in its nature, continuing until a specified time or until the further order of the court; but it does not conclude a right. It can

be granted at any period of the suit, even *ex parte*, without a notice to the other party to show cause why it should not be granted. It remains in force till the date of hearing, if not dissolved before that date. In India the grant of temporary injunctions is regulated by Civil Procedure Code, Order 39; its object and effect is to preserve the property in dispute in *status quo* until the final disposal of the case. A perpetual injunction, on the other hand, can only be granted by a decree made at the hearing and upon the merits of the case: it is granted when a right is established and it then follows that no obstruction can be made or repeated in future by the other party claiming under an adverse title.[1] The defendant is, by such an injunction, perpetually restrained from the assertion of a right or from the commission of an act which would be contrary to the right of the plaintiff.[2]

Statutory contracts—A court can restrain the breach of a statutory contract by an injunction even without proof of actual damage, e.g., where a railway company or any public body is exceeding its statutory powers or using them vexatiously and oppressively or colourably.[3] In such cases the Attorney-General is the applicant and he has only to show that the tendency of the act is to produce serious public mischief[4]; similarly a shareholder can apply[5].

Perpetual injunction, when granted—It may, at the discretion of the court, be granted to prevent the breach of an obligation existing in favour of the applicant. In case of contracts, the provisions of ss. 12 to 29 guide the grant of the injunction. The jurisdiction of a court of equity to

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1 Appa v. Appa. 4 Bom. L. R. 534.

2 Lowndes v. Beetle, 33 L. J. Ch. 453.

3 City of Westminster case, (1904) 1 Ch. 759; Att.-General v. Hanwell, (1900) 1 Ch. 51.

4 Byce, (1903) 2 Ch. 556.

5 Punt's case, (1903) 2 Ch. 576.

issue an injunction in cases of contracts is co-extensive with its jurisdiction to decree specific performance. If the contract is not specifically enforceable, the court will not, by way of injunction, restrain the breach thereof[1] ; but the remedy by injunction is in some cases available even where the remedy by specific performance is not granted[2] ; s. 54 gives the cases in which such an injunction is granted (in case of Torts) if the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, viz :—

(1) If the defendant is a trustee for the plaintiff.

(2) Where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion.

(3) Where pecuniary compensation would not afford adequate relief. The Bombay High Court has laid down the *test* that damages should be awarded where the injury is not so serious that the property might not still remain the plaintiff's and be as substantially useful to him as before.[3]

(4) Where it is probable that pecuniary compensation cannot be got for the invasion.

(5) Where it is necessary to prevent a multiplicity of proceedings.

Practice as to granting injunction—Injunction will be refused if it would operate oppressively or inequitably or contrary to the real justice of the case, where it is not the fit and appropriate mode of redress, where it would cause injury, where it is unreasonable, or undesirable consequences might ensue. (*Story.*)

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1 Davies v. Malcolm, 29 Ch. D. 596.

2 Flourington, (1903) 1 Ch. 920.

3 Holland v. Worley, 20 Ch D. 575 ; Pattison v. Gilford, 18 Eq. 259 ; Kadarbhai v. Rahimbhai, 13 Bom. 677, Dhanjibhai v. Lisboa, 13 Bom. 252 ; Kalidas v. Purjaram, 15 Bom. 330.

Mandatory injunction—This is something positive in character as opposed to an ordinary injunction which is issued to a person merely to restrain him from breaking the contract or from invading a person's right to the enjoyment of property ; or to preserve the property in *status quo* for a time. S. 55 of the Specific Relief Act says that when to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court has the discretionary jurisdiction to grant an injunction to prevent the breach complained of ; and also to compel performance of the requisite acts. The applicant seeking this relief must not slumber over his rights at all ; he should be active and not guilty of laches ; further, he has to make out a stronger case than when he seeks an ordinary injunction.[1] see *Smith* v. *Smith*, (1875) L. R. 20. Eq. 500.

Prob.—How will a court of equity act in the following cases:–

(*a*) A town municipality built upon land which ought to have been left open. A sued on behalf of the other inhabitants to prevent the building but meanwhile they had been completed.

(*b*) A sold mixed tea under the name of Howkha's Mixture, and in his advertisements he made false statements to the public as that it was the tea used by Howkha ; B sold his mixture under the same name ?

A.—(*a*) This is a matter wherein the interests of all residents of the locality are concerned ; of course, if it were

1 Durel v. Pritchard, L. R. 1 Ch. 244 ; Dent v. Auction Mart Co, 2 Eq 238 , Holland v. Worley, 26 Ch. D. 578 ; Land Mortgage Bank v. Ahmedabhai, 8 Bom. 35 , Jamnadas v. Atmaram, 2 Bom. 133

between private individuals, the court would have no recourse but to grant a mandatory injunction; here the court has to see what would be a good arrangement for the parties; if the municipality agree to dedicate another piece of ground in lieu of the one built upon, mandatory injunction would not be granted.[1]

(*b*) In a case with these facts it was held that the conduct of the plaintiff A disentitled him to any relief, and so no injunction would be granted agaist B who copied A in his false and puffing recommendations of goods. But in a similar case it was held latterly that mere puffing recommendation, though not strictly true, would not of itself be sufficient to debar the plaintiff; but this latter decision is open to doubt inasmuch as it does not distinguish between puffing recommendations and utterly false statements.[2]

(*i*) *Clubs.*—As regards expulsion of a member from a club, it is restrained if the member has not had an opportunity of being heard,[3] except where the club is a trade union or a proprietary one.[4]

(*ii*) It is issued in case of trade conspiracy, e. g., boycotting, watching and besetting, only if the damage would otherwise be irreparable.[5]

(*iii*) False statements at Parliamentary elections can be restrained.

Injunction to restrain libel—An injunction is given at the hearing, i.e., disposal of the suit generally.[6] But

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1 Graham v. Swan, 7 Ap. C. 547.
2 Pidding, 8 Sim. 477; Holloway v. Holloway, 13 Beav. 209.
3 Fischer v. Jackson, (1891) 2 Ch. 692.
4 Baird v. Wells, 44 Ch. D. 661.
5 Charnock, (1899) 2 Ch. 36.
6 Solomon v. Knight, (1891) 2 Ch. 294.

it is often restrained by an interlocutory injunction when there is a clear case. Before the Judicature Act it could not be done.[1] It is only when there is a wholly unjustifiable and atrocions libel, likely to cause irreparable injury to the applicant, that the court would grant this remedy on an interlocutory application.

Light and air cases—In England, when a person builds so near the house of another as to darken his windows against the clear right of the latter, either by contract or by ancient possession, the court interfers by an injunction except where damages would be a substantial compensation. The rule of 45° has now become obsolete. The Bombay High Court has laid down that there is no rule of law that ancient lights may be interfered with provided it leaves an angle of 45°[2]. Now the test laid down is "whether there is a substantial privation of light which is enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and in the case of business premises which is enough to prevent the plaintiff from carrying on his business as beneficially as before."[3] In India under ss. 33 and 35 of the India Easement Act neither damages nor injunction could be granted for a mere trivial disturbance. Under S. 33 a plaintiff would be entitled to sue only when the disturbance of his right has caused substantial damage. In the case of a right to light and air, it is substantial only when the disturbance materially interfers with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to the institution of the suit.

Waste—Permissive waste is not generally restrained but, as laid down in a leading case,[4] equitable waste is, if

1 Quartz Hill Co. v. Beal, 20 Ch. D. 501.
2 Abdullah v. Beg Mahommad 5 Bom L, R. 446.
3 Colls v. H. & C. Stores (1907) A. C. I. Paul v. Robson 42 Cal. 46.
4 Garth v. Cotton, 2 W. T. 971.

it is prejudicial to the inheritance. The mere fact of countervailing advantage is no defence. Waste is any spo or destruction by a particular tenant to the damage successor as is contrary to the intention of the settlor. the case of mortgages, a court of equity will restrain th mortgagor in possession from doing any act whereby th security becomes insufficient.[1] A mortgagee in possessio can be restrained from felling timber, unless the security insufficient. A tenant for life is not liable for permissi waste, legal or equitable. A court does not now stay ame orative waste by an injunction (e. g., converting warehouse property into a residential one—more calculate to let and otherwise more valuable).[2]

Nuisance—The Attorney-General alone can sue for a injunction. In case of a public nuisance the ordinary remed is a criminal action. It affords ground for civil action on if it causes special damage.[3] No action can lie if the nuisanc is legalized by statute.[4] A private nuisance is restraine only if the mischief is irreparable and is a constant recurring grievance. The *test* is whether there is such a inconvenience caused which materially interferes with th ordinary comfort, physically, of human existence. Bu under the new Civil Procedure Code of 1908, power is give to the Advocate-General to move a civil court in case a public nuisance.[5]

Trade mark—The question is, how far the defendant' trade mark bears such a resemblance to that of the plainti as to be calculated to mislead incautious purchasers ; a a matter of fact, no one has the liberty to sell his goods a those of a rival trader. It is sufficient if the resemblance

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1 Robinson v. Litten, 3 Atk. 209.
2 Doherty, 3 A. C. 709.
3 Attorney-General v. Brighton, (1900) 1 Ch. 276.
4 L. B. Ry. Co. v. Truman, 11 A. C. 45.
5 Walter v. Selfe, 4 De, G. and S. 323.

likely to deceive ; it is not necessary that any one should have been actually cheated ; mere possibility of deception is not enough.[1] There must be a probability verging affirmatively towards a certainty. Want of fraudulent intention is no defence.[2]

Patent—Says Kerr, " There is an infringement of patent only when a man uses directly or indirectly the invention which is the subject of the privilege, or employs means only colourably different to produce the same result"; the identity must be not faint, but substantial. This is protected in India by Act V of 1888. The aggrieved person must show that his is a *new* invention of *untility* and that he is the inventor ; the specification must also be completely shown. Injunction is not a matter of right. If the patent is recent and not established, it must be established. In some case the court refuses to issue *ad interim* injunction, resting satisfied with defendant's *undertaking* to account.

Copyright—Registration is necessary.[3] The term for which copyright shall subsist shall be the life of the author and a period of fifty years after his death. Injunction is given in case of piracy, i. e., servile or evasive imitation of the original book. *Bona fide* abridgment or use of common materials or extracts from the original is no piracy so as to be an infringement of the right. *Test* is:—Has there been a legitimate and fair exercise of mental ability, industry and discrimination resulting in the production of a new work ?[4] But it would be an infringement if, instead of searching into the common sources in an independent and critical manner, an author quietly and servilely avails himself of the labour of his predecessor and adopts his arrangements or does it with only colourable variations. The fact of appearance,

1 Barlow v. Gobindram, 24 Cal, 364.

2 Graham v. Kells, 3 Ben. L. R. 4 ; Leather Cloth Co. v. American L. Co., 11 H. L 583.

3 Johnson v. Newes, (1897) 3 Ch. 663,

4 Champbell v. Scott, 12 Sim. 31 ; Lewis v. Fullerton, 2 Beav. 6.

in the alleged copy of same inaccuracies or blunders that are to be found in the first published work, is a piece of evidence to show piracy.[1] There may be copy right in oral lectures or title of a book, and in illustrations. headings, letters on literary subjects, or private matters, or in unpublished manuscripts. There is no bar to challenging a second edition of a pirated work merely because the first one was allowed to pass.[2]

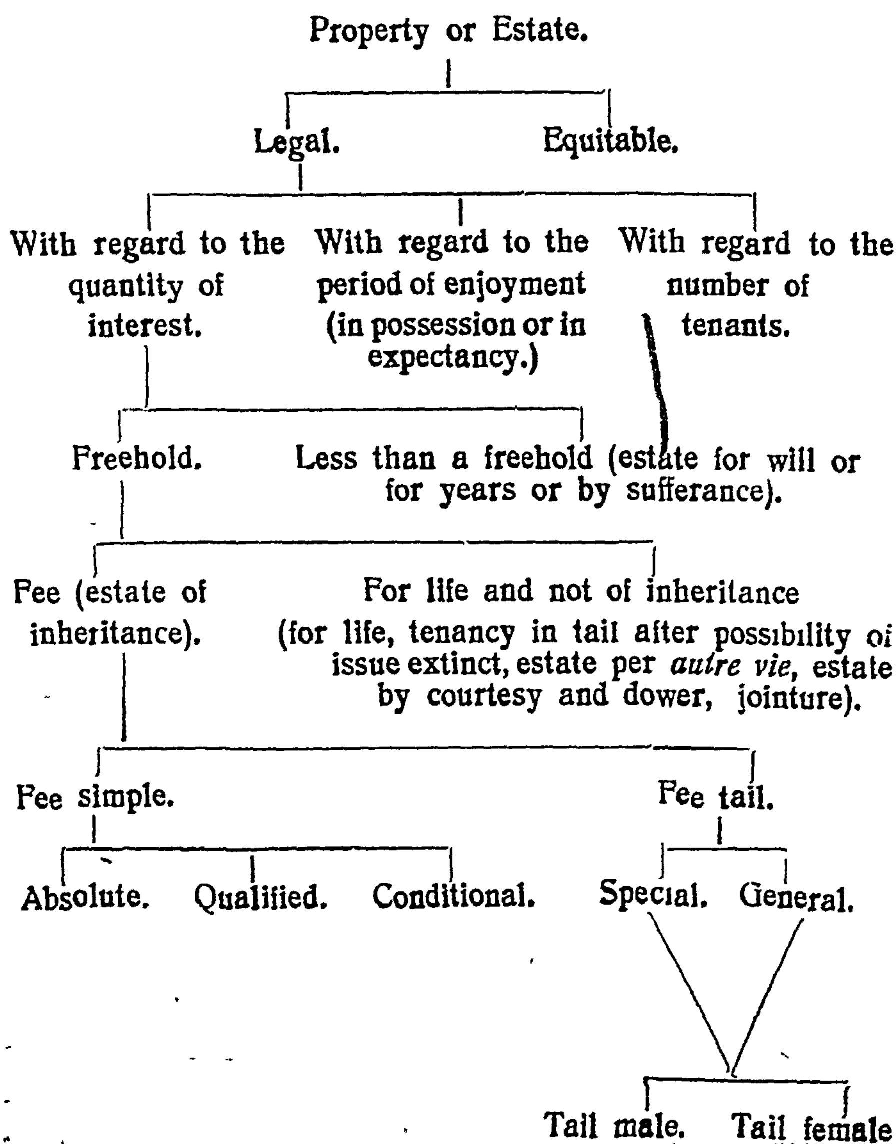
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1 Leslie v. Young, (1894) A. C. 335.
2 Hogg v. Sooth, L. R. 18 Eq. 444.

APPENDIX A.

TECHNICAL TERMS

THE following table explains the relation between the different kinds of estates recognized in England (the feudal tenure not being prevalent in India, all the distinctions do not prevail in this country) :—



Explanations—*Right of property* consists in a man's free use and enjoyment and disposal of all his acquisition in external things round him ; property may be real or personal. *Real Property* consists of things substantial and immovable and of the rights and profits annexed to or issuing out of these ; whereas *personal property* consists of goods or money and all other movables and of such rights and profits as relate to movables ; these are also called chattels personal. Any interest in real property, for certain years or at will, which does not amount to a freehold, is a chattel real.

Hereditament is whatever may be inherited ; it includes lands, tenements and all things, real or personal, corporeal or incorporeal ; corporeal, i. e., such as may be seen and handled, e. g., land itself ; incorporeal i. e., those which cannot be seen or handled, e. g., easements, rights and profits annexed to or issuing out of land.

Estate signifies the interest of a tenant in the property. It is legal or equitable.

Legal estate is a limitation of interests in realty which gives a party a right at law to the ownership and profits.

Equitable estate is such an interest as was recognized in equity only, i. e., the beneficial ownership of the land as distinguished from legal seizing.

Freehold is an estate of inheritance (fee) or not of inheritance (for life) in lands or tenements of free tenure. The mode in which this estate was created, i. e., by solemn delivery of possession, is technically termed, *feoffment*.

Fee (estate of inheritance) is where the tenant is not only entitled to enjoy the land for his own life, but where, after his death intestate, it goes in descent to his representatives by blood. It may be fee simple or fee tail.

Fee simple is an estate which a man has to hold to him and his heirs in general, i. e., it can pass to heirs lineal and collateral, male and female ; it may be (*a*) absolute, i.e.,

unlimited in duration and then fails only for want of heirs; (*b*) base or qualified, i. e., determining when the qualification annexed to it (on which the estate is held) ends; (*c*) conditional. i. e., granted on a condition.

Fee tail is an estate given to a man and the heirs of his body; this estate descends to children so long as posterity endures. It does not go to heirs collateral and is less than an estate in *fee simple* in that respect.

Tail general is an estate extending to the heirs of a person of his body begotten on any person; so the issue of a man by all his wives would be included.

Tail special extends to the heirs begotten on a particular person, e. g.. by marriage with any specified wife.

Tail male is an estate confined to male issue; if it is to females, it is called *tail female*

Tenant in tail after possibility of issue extinct is an estate which arises on a gift or grant to one in special tail, and the person from whose body the issue was to spring dies without issue, or the issue becomes extinct and the surviving tenant is styled as above.

Estate for life is either (*a*) conventional, i. e., created by act of parties, or (*b*) legal, arising by operation of law; the tenant cannot give a perpetual lease or pass an estate to his heir in perpetuity.

Estate per autre vie is one where a tenant holds the estate, not for his own life, but during the life of another.

Estate by courtesy is that to which a man is entitled on the death of his wife, in the lands and tenements of which she was solely seized during the marriage, provided he had issue by her, born alive during the marriage.

Estate by dower is an estate for life of a wife in a third part of the freehold lands of inheritance of her husband; of

which he was solely seized and which her issue might have inherited.

Jointure is an estate (in lieu of fewer) for the life of his wife, to take effect in possession or profit immediately after the husband's death ; this is conventional arising by express contract of the parties.

Estate for years is where a tenant has interest in lands and tenements and a possession by virtue of that interest for a fixed period of time.

Tenancy at will is one held at the will of both parties (landlord or tenant), so that either of them can determine it when he chooses ; it may be created by an express agreement.

Tenancy at sufferance is an estate which arises when a person has originally come into possession of an estate by a rightful title, but holds over after that title has determined (s. 116, T. P. Act).

Estate in expectancy may be (1) in reversion
(2) in remainder.

Reversion is the residue left in the grantor which is to commence in possession after the determination of a particular estate.

Remainder is an ulterior estate limited to take effect and to be enjoyed after a prior estate is determined, both estates being created at the same time. It arises out of express grant, whereas reversion may arise by operation of law as a result of a grant of a particular estate ; it may be vested or contingent.

Vested remainder is a present existing estate always ready, so long as it lasts, to come into possession the moment the prior estate determines, the person entitled is sure to take if he survives till the prior estate is determined ; it does not rest on any contingency (ss. 19, 21, T. P. Act).

Contingent remainder is one limited either to an uncertain person or upon an uncertain event, and as soon as that person is ascertained and the event is determined the estate becomes vested.

APPENDIX B.

LEADING EQUITY CASES.

Howard v. Harris. (*Mortgage.*)

Equity of redemption is the natural right of the mortgagor. A mortgage cannot be made irredeemable. No stipulation entered into at the time of the mortgage can make it irredeemable. A court of equity would not countenance any restrictions on the rights of redemption. 'Clogs' such as would fetter the mortgagor's right of redemption, would not be enforced. The true principle is that the transaction cannot at one time be a mortgage and another time cease to be so by the same deed; hence the maxims "Once a mortgage always a mortgage" and "A mortgage cannot be a mortgage on one side only."

Russell v. Russell. (*Equitable mortgage.*)

In England, under s. 4 of the Statute of Frauds, a writing was required for the assignment or transfer of interests in immovable property; but afterwards that came to be doubted in its strict general application, and equitable mortgages by deposit of title-deeds came to be recognized. In this case a lease had been pledged with the plaintiff by a person (since bankrupt), and the plaintiff had brought his suit against their assignees for the sale of the leasehold estate, and it was held by the court of equity that the deposit created a valid equitable mortgage on the application of the maxim "He who comes into equity must do equity," i.e., if a man wants the deeds back, he must first repay the money.

Pusey v. Pusey. (*Specific performance.*)

Though in case of a contract relating to movables the presumption is that a breach thereof can be compensated

for by damages, a court of equity would decree specific performance if the chattel is of such a nature that the loss of it could not be adequately compensated, i.e.. could not be measured in money, e.g., in case of articles of unusual beauty and rarity such as ancient curiosities, horns, altar-pieces with inscriptions, vases, heirlooms. In this case the defendant was made to deliver over the specific horn which in ancient times was delivered to the ancestors of the plaintiff to hold their land by ; in another case the plaintiff was, on the same equitable grounds, held entitled to the specific delivery to him of an old altar-piece made of silver remarkable for ancient incriptions and dedicated to the god Hercules.

Cudee v. Rutter. (*Specific performance.*)

Another exception to the general rule as to specific performance stated in the above case is this—specific performance may be decreed even in case of agreements relating to personal chattels, only if they refer to sale of shares in a private undertaking ; but not if they are respecting to stock always available in the market; for then damages would afford full compensation. In this case the dispute was as regards the transfer of a certain sum of South Sea Stock, and it was held that there being no difference between such a stock and any other like sum of stock there could be no specific performance, the remedy for non-performance being a suit for damages occasioned, which would be a sufficient compensation and adequately measurable by difference. If the stock were much limited in number, like shares of private companies, the result would be different.

Seton v. Slade. (*Lapse of time, how far a defence to specific performance.*)

At law, time used to be always held of the essence of the contract ; but in equity, time is deemed *prima facie* non-essential and the laspe of it is not allowed as a defence to

a suit for specific performance except in the following cases :—

(1) Where it was of the essence of the contract originally by express agreement or the nature of the case, or (2) where it was made so by subsequent notice, or (3) where its laspe is such as to constitute laches or abandonment. In this case the plaintiff had agreed to sell certain property to the defendant and to make out a good title in two months. Defendant gave him notice that if he did not do so his deposit should be returned with interest ; the plaintiff delivered his abstract some days before the expiry of two months. The defendant kept it with him, and it was held that in the circumstances of the case the defendant purchaser could not insist upon time as the essence of the contract so as to bar the suit for specific performance. In such a case the court would award compensation to the defendant for the plaintiff's failure to comply with the strict terms as to time. See ss. 14 and 15, Specific Relief Act.

Woolam v. Hearn. (*Specific performance with a variation*)

Mistake of the defendant, if it would render specific performance a hardship, is a valid ground of defence to a suit for specific performance. But evidence of such a mistake could not be given. It was wholly inadmissible at law and was allowed to be offered in equity only, and that too not by the plaintiff but only by the defendant resisting specific performance. A plaintiff suing to compel specific performance could not ; hence the equitable doctrine that though a defendant resisting specific performance may go into parol evidence to show that by fraud the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of obtaining specific performance with a variation. This, though a general rule, is subject to some exceptions in which cases the plaintiff can obtain specific performance with a parol variation :—

(1) Where the parol variation is in favour of the

defendant, and the plaintiff offers to perform the agreement with a variation.

(2) Where the defendant sets up a parol variation and the plaintiff seeks specific performance of the agreement with the variation.

(3) Where there have been acts of part performance of the parol portion, justifying a decree for specific performance in the case of an original agreement.

(4) Where an ommission has occurred by fraud. (*Snell.*)

This parol variation is allowed to be set up by the defendant in spite of the Statute of Frauds, for though the Statute says that an unwritten agreement shall not bind it, it does not expressly say that a written contract shall always necessarily bind. The principles laid down in the case have been followed in the leading case of **Lord Townshend v, Stangroom,** and introduced in the Specific Relief Act, s. 26.

Huguenin v. Basely. (*Constructive trust*)

Whenever parties stand to each other in fiduciary relation, e. g., in a case of solicitor and client, guardian and ward, trustee and his *cestui que trust,* principal and agent, medical advisers, ministers of religion—the one is generally presumed to be in a position to influence the will of the other. In such cases if the person in whom the confidence is reposed, make use of it to obtain an advantage to himself at the expense of the person confiding, equity will not allow him to retain the advantage so obtained, though no evil design may have been connected with the transaction or it would be justifiable if no such relationship existed. This rule is based on principles of public policy, and equity imputes constructive fraud to the person in whom the confidence was reposed. Influence being presumed, equity affords relief in these cases. In this case, Mrs. Huguein, a widow, constituted defendant, Basely, her agent, and he undertook the manage-

ment of her property. A voluntary settlement was executed thereafter by her in favour of him and his family. She again married after a time and with her husband brought a suit to set aside the settlement passed by her, when it was held that the settlement having been obtained by undue influence and abused confidence in the defendant as an agent of Mrs. Huguenin, it should be set aside on the general principles of public policy applicable to the relationship of guardian and ward. It must be noted that, if the plaintiff confirms what he or she has done (after knowledge of his or her rights) or is guilty of laches, the court will not interfere.

Basset v. Nosworthy. (*Purchaser for value without notice.*)

This case shows how far the defence, that a person was a "purchaser for value without notice" could be pleaded in equity ; but the case is now of historic importance only, for by the Judicature Acts, law and equity are fused together, and since discovery is not peculiar to one division of the bench more than to another, the principle laid down in this leading case loses its force. There, a bill was filed by an heir-at-law against a person claiming as purchaser from a devisee under the will of his ancestor to discover a revocation of the will, and the defendant urged that he was a purchaser for value in good faith without notice of any revocation. The plea was allowed and the plaintiff's bill was ordered to be dismissed because, though the plaintiff had the legal estate, the defendant held an equitable estate ; but this plea was allowed in the absolute auxiliary jurisdiction ; this defence would not, however, have been sufficient even then in the concurrent jurisdiction, and now it is not in the least valid and can afford no protection anywhere owing to fusion of law and equity by the Judicature Acts.

Lord Glenorchy v. Boswille (*Executed and executory trusts.*)

This leading case very clearly illustrates the distinction between trusts executed and trusts executory. As explained

in "executed trusts," nothing is left undone, and the settlor is said to be his own conveyancer ; in executory trusts, the materials for inferring the intention are indicated but the final completion of the trust is left for the trustees. The only question is, "what construction should be put on the limitations created in the instrument?" Of course, equity follows the law in case of trusts excuted, but in case of trusts executory, which generally arise in marriage settlements and in wills, the limitations are construed as in law so long as an analogy plainly subsists. Deviation is made only when there is special reason for so doing. In this case a certain Mr. Pershall had devised his real estate to trustees upon trust (upon the happening of the marriage of his grand-daughter Arabella) to convey the said estates to the use of Arabella for life, remainder to her husband for life, remainder to the issue of her body with remainder over; and it was held that, since the trust was executory—the rule in Shelly's case which is a rule of law would not apply—and the object being presumably to provide for the issue of the marriage, the best construction serving the intentions of Pershall would be to rule that the conveyance was to Arabella for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters; it must be noted, however, that if the devise had been immediate, Arabella would have taken an estate tail. This was a case in which an executory trust was created by a marriage settlement. The result would not be the same if it arose in a will where the limitations would be construed acording to the legal effect of the words used, unless a contrary intention were expressly indicated. In such a case there is no presumption of the intention to provide for the issue of marriage as in a marriage settlement.

Ellison v. Ellison. (*Voluntary trusts.*)

The general rule of equity is that an imperfect voluntary conveyance will not be enforced. The mere fact of its being

in favour of a volunteer, i.e., without consideration, is not of itself a bar to its execution ; the only question is, "Has it been completely executed ?" All that is necessary is to see if the author of the trust has done everything which, according to the nature of the property comprised in the instrument, is necessary to be done in order to transfer the property and make the instrument binding on him. Thus in case of a settlor being both legal and equitable owner, if he has actually conveyed the estate to the donee or to a trustee or has made a declaration of trust for the donee, it is sufficient; and such a trust will be enforced by a court of equity though it is voluntary. The court of equity sees whether the relation of trustee and *cestui que trust* is created ; if so, the equitable interest, though without consideration, is generally enforced in favour of the volunteer. In this case there was mere voluntary covenant to transfer stock ; and it was held that since the relationship of a trustee and *cestui que trust* was not constituted, the court of equity would not lend its assistance to enforce the trust in favour of the claimant donee.

Fox v. Macreth. (*Purchase by trustees.*)

Every transaction of a trustee with his *cestui que trust* is viewed by a court of equity with much jealousy. A trustee is not allowed to derive any advantage out of the trust; all profits made by him in virtue of his office belong to the beneficiaries. He cannot ordinarily buy for himself or for a third person the property which he holds in trust. He can purchase from the *cestui que trust* if the latter is *sui juris* and had discharged the trustee of his obligations in relation to the trust ; and then again the trustee has to show that there was clear and distinct contract ascertained to be such after a complete examination of all the surrounding circumstances, and that there was no fraud, concealment or any advantage whatever taken by the trustee of any information acquired by him while filling his office of trustee. The

intending trustee can therefore buy the trust property–as held in *Cooks* v. *Boswell*—only if he gives a fancy price for it; and when sale is by a public auction and the offer to sell has proceeded from the *cestui que trust.* There must further, be the leave of the court to bid, obtained beforehand. In this case, Macreth, who was a trustee for Fox of certain property, had agreed to buy the property for a certain sum, and the same was immediately sold by Macreth to one P for a large sum, whereupon an action was brought by Fox to recover the advantage obtained by Macreth out of the sale of the trust property, and it was held, having regard to the principles enunciated above, that Macreth was a constructive trustee as to the profits made by him by the sale to P, and as such the claim was decreed against him.

Keech v. Sandford. (*The Rumford Market case.*)

This case also proceeds on the same principle, i. e., a trustee can make no profit from his trust, and that if he does so, he becomes a constructive trustee of that profit for the beneficiary, i. e., *cestui que trust.* In such cases a court of equity raises a trust to satisfy the demand of justice without reference to the presumable intentions of the parties. In this case the lease of a market had been bequeathed to a trustee, X, in trust for an infant. X had, before the expiration of the lease, applied to the lessor for a renewal of the lease for the benefit of the infant, but it was refused; subsequently, however, X got a renewal of the lease to himself in his own name, and the infant brought an action in Chancery to have the said renewed lease assigned to him. It was held that X, having occupied fiduciary relation in respect of the property affected by the renewed lease, he was a constructive trustee for the benefit of the *cestui que trust,* and that therefore the renewed lease must be assigned over to the infant. It must be noted, however, that if the new lease contained other lands, in addition to those devised by the old lease, the constructive trust will, as held in *Acheson* v. *Fair,* attach to the latter lands only.

Robinson v. Pett. *(Remuneration of trustee.)*

This case also proceeds on the same principle, that a trustee should not profit by his trust and so no remuneration can be allowed to trustees. As a general rule, a court of equity never allows a trustee or an executor remuneration for his time and trouble ; but it is subject to certain exceptions. He can charge his remuneration (s. 50, Trusts Act) only if it is expressly allowed by the court or by the trust instrument or by an express contract between the trustee and the beneficiary. If a solicitor is appointed trustee and no provision is made for his professional charges he cannot charge anything but out-of-pocket expenses. In such cases the settlor usually authorizes the solicitor trustee by the instrument to charge for his strictly professional services. He can make his usual charges if he is employed by the co-trustees or by the beneficiary to defend an action relating to the trust affairs.[1]

Brice v. Stokes. *(Liability of a trustee for defaults of a co-trustee.)*

When more persons than one are appointed trustees, their power being a joint one, they have all to join in giving receipts. The question often arises when a non receiving trustee, who has joined formally in giving receipts, is sought to be held liable for the misappropriation or misapplication of waste of money by the recipient co-trustee, i. e., for his neglect of duty in leaving the money (unsecured) in the hands of the co-trustee. The principle laid down in the leading case of *Townly* v. *Sherborn*, that a trustee is not necessarily liable for the acts and defaults of his co-trustee is approved in this case. There, a trustee had joined his co-trustees in the sale of a trust property ; the sale was found by the court to be un-necessary, and the trustee had

1 Cradock v. Piper. 15 L. T. 61 ; Lawson v. Elwest, 56 L, J Ch. 294 Eq. 8.

allowed the purchase-money to remain with his co-trustee, and permitted him to act with the money contrary to the trust ; and it was held that though the non-receiving trustee who had joined in the receipt for conformity sake was not liable because of his mere joining, he was, under the particular circumstances of the case, liable to be charged with the purchase-money. A trustee is at least under this obligation (s. 26, Indian Trusts Act), that he shall not allow money to remain with the recipient trustees longer than the circumstances reasonably require, and if with all that he does so, he must be held liable. But there is one distinction between the case of co-trustees and co-executors, that whereas in the case of trustees, it being necessary for all to join in receipt for the sake of conformity, there is no presumption of receipt by all joining, in the case of executors, it is the contrary, their power being several and not merely joint, and it is not necessary for them all to join in the receipt (for conformity) ; there is strong presumption that those who joined in the receipt actually received the money. This is, of course, a rebuttable presumption that can be met with by the evidence of the particular executor not having received the money (*Wesely* v. *Clarke*). In this case it was further held that a trustee committing a breach of trust is not liable in respect of the interest of one of the beneficiaries who had notice of the breach of trust and had acquiesced therein ; but persons under disability, e. g., married women and infants, are not ordinarily bound by such an acquiesence.

Acroyd v. Smithson. (*Conversion case.*)

In this case, the testator gave his realty to trustees upon trust to sell and devide the sale-proceeds between A and B equally. A died in the lifetime of the testator, but B outlived him. There being a laspe of gift to A, the question arose as to who was entitled to A's share. The next of kin of the testator, thereupon claimed as personal estate. It was

held that A's share belonged to the testator's heir-at-law and not to his next of kin. The decision proceeded on the ground that there was no clear intention on the part of the testator to give A's share in the sale-proceeds to the testator's next of kin, in the event of the failure of bequest to A. The conversion of realty into personalty was only for the purpose of the will and in so far as the purpose of the will failed, the heir's right to the realty was not displaced. The heir's right to the realty could only be defeated by a gift of property to someone else.

Dyer v. Dyer. (*Resulting trust, purchase in name of child, advancement.*)

In this case, certain copyhold premises were granted to A, B his wife, and C his son, to take in succession for their lives and to the longest liver of them. The purcahase-money was paid by A, the father. He survived his wife, and died leaving a will, whereby he devised all interest in the copyhold permises to the plaintiff, his younger son. C, the defendant, urged that the insertion of his name in the grant operated as an advancement to him from his father. The principle is that the trust of a legal estate taken in the name of the purchaser and others jointly results to the man who advances the purchase-money. This resulting trust may be rebutted by circumstances in evidence, e. g., when a father buys property and has it put in the name of his son, *prima facic*, it is a gift to him. The relation between the true and the nominal purchaser often raises the presumption of advancement, when the former is the husband or father of the latter.

Howe v. Lord Dartmouth. (*Trusee's duty to convert.*)

This case lays down the principle that when there is a residuary bequest of personal estate to be enjoyed by persons in succession, the trustees must, unless the will shows a contrary intention, realize such parts of the estate as are of a wasting character or of a reversionary nature or are not investments authorized by law and invest the pro-

ceeds in authorized securities. The rule in *Howe* v. *Lord Dartmouth* does not apply (1) where the property is settled by deed, (2) where the bequest is not residuary but specific, and (3) where the property is real.

Stapilton v. Stapilton, (*Compromise—family arrangement.*)

A, the father, and B and C, his two sons, executed a lease and a release. The father owned considerable real estate. On trial it turned out that B, the eldest son, was illegitimate. In the absence of the agreement, B, being illegitimate, would not have got anything. On the other hand, C being the younger son would not have got anything if B's legitimacy had been proved. To prevent disputes in future, the father brought his sons into an agreement to divide the real estate. The case lays down the following principle:—

An agreement entered into upon a supposition of a right or of a doubtful right, though it afterwards turns out that the right was on the other side, shall be binding and the right shall not prevail against the agreement of the parties. Where agreements are entered into to save the honour of a family and are reasonable ones, a court of equity will, if possible, decree a performance of them.

Harding v. Glyn. (*Powers in the nature of trusts, precatory trusts.*)

A, by will, gave a leasehold house and furniture, goods therein, etc., to his wife; but desired her, at or before her death, to give the same to such of his own relations as she should think most deserving and approve of. The wife by her will gave the leasehold house to B, the son of the next of kin, bequeathed the residue of her personal estate to C, the defendant, but she did not give the goods in the house to her husband's relations. It was held that the wife was intended to take beneficially during her life. With regard to property not disposed of by her, there was a trust, in the wife, by way of power of naming and apportioning, and on her non-performance of the power, the power shall devolve on the court. Therefore, according to the power, the goods not disposed of, in case they remained in specie, or the value thereof, ought to be disposed of equally among such of the relations of the testator who were his next of kin at the time of the death of his wife.

ACT No. II OF 1882.[1]

[*13th January* 1882.]

An Act to define and amend the law relating to Private Trusts and Trustees.

[*As modified up to* 1*st March* 1929.]

Preamble.

WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; it is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title. Commencement.

1. This Act may be called the Indian Trusts Act, 1882: and it shall come into force on the first day of March, 1882.

Local extent.

It extends in the first instance to the territories respectively administered by the Governor of Madras in Council, the Lieutenant-Governors of the North-Western[2] Provinces and the Punjab, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam; and the Local Government may from time to time,

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1 For Report of the Indian Law Commission on the Private Trusts Bill which they were instructed to consider among others, see Gazette of India, 1880, Supplement p. 100, and for the Statement of Objects and Reasons, see Gazette of India, 1880, Pt. V. p 476; for Report of the Select Committee, see ibid, Supplement, 1881, p. 766; for further Report of the Select Committee, see ibid, Supplement, 1882, p 67; for Proceedings in Council, see ibid, Supplement, 1881, p. 687; and ibid, Supplement, 1882, p. 68.

2 The reference to the Lieutenant-Governor of the North-Western Provinces and the Chief Commissioner of Oudh should be construed as referring to the Governor of the United Provinces of Agra and Oudh, and the reference to the Chief Commissioners of the Central Provinces and Assam to the Governors of those Provinces.

by notification[1] in the official Gazette, extend it to any other part of British India. But nothing herein contained affects the rules of Muhammadan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private, religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second Chapter of this Act applies to trusts created before the said day.

Savings.

2. The Statute and Acts mentioned in the Schedule hereto annexed shall to the extent mentioned in the said Schedule, be repealed, in the territories to which this Act for the time being extends.

Repeal of enactments.

3. A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner :

Interpretation clause— "trust";

the person who reposes or declares the confidence is called the "author of the trust": the person who accepts the confidence is called the "trustee" : the person for whose benefit the confidence is accepted is called the "beneficiary" : the subject-matter of the trust is called "trust-property" or "trust-money" : the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property ; and the instrument, if any, by which the trust is declared is called the "instrument of trust" :

'anuthor of the trust'. "trustee": "beneficiary": "trust-propery": "beneficial interest"; "instrument of trust":

1 This Act has been extended under this section to—

(1) the whole of the Bombay Presidency, including the Scheduled Districts—see Notification No. 4802, Bombay Gazette, 1891; Pt. I, p. 743 ;

a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust" :

"breach of trust";

(2) The area included within the limits of Rangoon Town as from time to time defined for the purposes of the Lower Burma Courts Act, 1900 (VI of 1900), Burma Gazette, 1904, Pt. I, p. 628;

(3) the Presidency of Fort William in Bengal, *see* Calcutta Gazette, 1913, Pt. I, p. 360.

(4) the province of Bihar and Orissa, *see* B. & O. Gazette, 1913, Pt. II, p. 1005;

(5) the District of Ajmer-Merwara, *see* Gazette of India, 1916, Pt. II, p. 2118.

and in this Act, unless there be something repugnant in the subject or context, "registered" means registered under the law for the registration of documents for the time being in force : a person is said to have "notice,' of a fact either when he actully knows that fact, or when, but for wilful abstention from inquiry or a gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumastances mentioned in the Indian Contract Act, 1872 section 229 ; and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

"registered":

"notice":

Expressions defined in Act IX of 1872.

CHAPTER II

OF THE CREATION OF TRUSTS.

Lawful purpose.

4. A trust may be created for any lawfull purpose. The purpose of a trust is lawful unless it is (*a*) forbidden by law, or (*b*) is of such a nature that, if permitted, it would defeat the provisions of any law, or (*c*) is fraudulent, or (*d*) involves or implies injury to the person or property of another, or (*e*) the court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Explanation.—In this section the expression " law " includes, where the trust-property is immoveable and situate in a foreign country, the law of such country.

Illustrations.

(*a*) A conveys property to B in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void.

(*b*) A bequeaths property to B in trust to employ it in carrying on a smugling business, and out of the profits thereof to support A's children. The trust is void.

(*c*) A, while in insolvent circumstances, transfers property to B in trust for A during his life, and after his death to B. A is declared an insolvent. The trust for A is invalid as against his creditors.

Trust of immoveable property.

5. No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of moveable property.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

Creation of trust.

6. Subject to the provisions of section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary and (*d*) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust–property to the trustee.

Illustrations.

(*a*) A bequeaths certain property to B, " having the fullest confidence that he will dispose of it for the benefit of C. " This creates a trust so far as regards A and C.

(*b*) A bequeaths certain property to B, " hoping he will continue it in the family. " This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(*c*) A bequeaths certain property to B, requesting him to distribute it amongst such members of C's family as B should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(*d*) A bequeaths certain property to *B*, desiring him to divide the bulk of it among C's children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.

(*e*) A bequeaths a shop and stock-in trade to B, on condition that he pays A's debts and a legacy to C. This is a condition, not a trust for A's creditors and C.

Who may create trust.

7. A trust may be created—

(*a*) by every person competent to contract,[1] and,

(*b*) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

Subject of trust

8. The subject-matter of a trust must be property transferable to the beneficiary.

It must not be a merely beneficial interest under subsisting trust.

Who may be beneficiary.

9. Every person capable of holding property may be a beneficiary.

Disclaimer by beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

Who may be trustee.

10. Every person capable of holding property may be a trustee; but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

No one bound to accept trust.

No one is bound to accept a trust.

Acceptance of trust.

A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance.

1 See s. 11 of the Indian Contract Act, 1872 (9 of 1872).

Disclaimer of trust.

Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him.

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust.

Illustrations.

(*a*) A bequeaths certain property to B and C, his executors, as trustees for D. B and C prove A's will. This is in itself an acceptance of the trust, and B and C hold the property in trust for D.

(*b*) A transfers certain property to B in trust to sell it and to pay out of the proceeds A's debts. B accepts the the trust and sells the property. So far as regards B, a trust of the proceeds is created for A's creditors.

(*c*) A bequeaths a lakh of rupees to B upon certain trusts and appoints him his executor. B severs the lakh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

CHAPTER III.

OF THE DUTIES AND LIABILITIES OF TRUSTEES.

Trustee to execute trust.

11. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation.—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (*a*) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or when such instrument is a will, at the date of his death, and (*b*) in the case of debts not bearing interest, to make such payment without interest.

Illustrations.

(*a*) A, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(*d*) A, a trustee, of certain land for X, Y and Z, is authorized to sell the land to B for a specified sum. X, Y and Z,

being competent to contract, consent that A may sell the land to C for a less sum. A may sell the land accordingly.

(*c*) A, a trustee for B and her children, is directed by the author of the trust to lend on B's request, trust-property to B's husband, C, on the security of his bond. C becomes insolvent and B requests A to make the loan. A may refuse to make it, it being injurious to the interest of the beneficiaries.

Trustee to inform himself of state of trust property.

12. A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Illustrations.

(*a*) The trust-property is a debt outstanding on personal security. The intrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(*b*) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case require.

Trustee to protect title to trust-property.

13. A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Illustration.

The trust-property is immoveable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, (Act III of 1877)[1] the trustee's duty is to cause the instrument to be registered.

Trustee not to set up title adverse to beneficiary.

14. The trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.

Care required from trustee

15. A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own ; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

Illustrations.

(*a*) A, living in Calcutta, is a trustee for B, living in Bombay. A remits trust-funds to B by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. A is not bound to make good the loss.

(*b*) A, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, B, then in credit. The rents are accordingly paid to B, and A leaves the money with B only till wanted. Before the money is drawn out B becomes insolvent. A, having had no reason to believe that B was in insolvent circumstances, is not bound to make good the loss.

(*c*) A, a trustee of two debts for B, releases one and compounds the other, in good faith, and reasonably believing

1 See now the Indian Registration Act, 1908, (16 of 1908)

that it is for B's interest to do so. A is not bound to make good any loss caused thereby to B.

(*d*) A, a trustee directed to sell the trust property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. A is bound to make good the loss caused thereby to the beneficiary.

(*e*) A, a trustee for B, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. A is bound to make good the loss, thereby caused to B.

(*f*) A, trustee for B of a policy of insurance, has funds in hand for payment of the premiums. A neglects to pay the premiums, and the policy is consequently forfeited. A is bound to make good the loss to B.

(*g*) A bequeaths certain money to B and C as trustees, and authorizes them to continue trust-money upon the personal security of a certain firm in which A had himself invested them. A dies, and a change takes place in the firm. B and C must not permit the moneys to remain upon the personal security of the new firm.

(*h*) A, a trustee for B, allows the trust to be executed soley by his co-trustee, C. C misapplies the trust-property. A is personally answerable for the loss resulting to B.

Conversion of perishable property.

16. Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or a reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instruments of trust, to convert the property into property of a permanent and immediately profitable character.

Illustrations.

(*a*) A bequeaths to B all his property in trust for C during his life, and on his death for D, and on D's death for E. A's property consists of three leasehold houses, and there is nothing in A's will to show that he intended the houses to be enjoyed in specie. B should sell the houses, and invest the proceeds in accordance with section 20.

(*b*) A bequeaths to B his three leasehold houses in Calcutta and all the furniture there in trust for C during his life, and on his death for D, and on D's death for E. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and B should not sell them.

Trustee to be impartial.

17. Where there are more beneficiaries than one the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the court to control the exercise reasonably and in good faith of such discretion.

Illustrations.

A, a trustee for B, C and D, is empowered to choose between several specified modes of investing the trust-property. A in good faith chooses one of these modes. The court will not interfere, although the result of the choice may be to vary the relative rights of B, C and D.

Trustee to prevent waste.

18. Where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust porperty, if he commits, or threatens to commit, any act which is destructive or permanently injurious there-

to, the trustee is bound to take measures to prevent such act.

Accounts and information.

19. A trustee is bound (*a*) to keep clear and accurate accounts of the trust-property, and (*b*) at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

Investment of trust-money.

20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others :—

(*a*) in promissory notes, debentures, stock or other securities [1][of any Local Government or] of the Government of India, or of the United Kingdom of Great Britain and Ireland

(*b*) in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India :—

[2][Provided that, after the fifteenth day of February 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity ; but nothing in this proviso shall apply to investments made before the date aforesaid] ;

[3][(*bb*) in India three and a half per cent. stock, India

1 These words were inserted by s. 2 and Schedule 1 of the Repealing and Amending Act, 1920 (31 of (1920)

2 This Proviso was added by s. (2) (i) of the Indian Trust (Amendment) Act, 1916 (1 of 1916).

3 This clause was inserted by s 2 (ii), ibid.

three per cent. stock, India two and a half per cent. stock or any other capital stock which may at any time hereafter be issued by the Secretary of State for India in Council under the authority of an Act of Parliament and charged on the revenues of India];

(*c*) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council [1][or by the Government of India] [2][or in debentures of the Bombay [3][Provincial] Co-operative Bank, Limited, the interest whereon shall have been guaranteed by the Secretary of State for India in Council];

(*d*) [4][in debentures or other securities for money issued, under the authority of any Act of a Legislature established in British India, by or on behalf of any municipal body, port trust or city improvement trust in any Presidency-town, or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi];

(*e*) on a first mortgage of immoveable property situate in British India: Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money; or

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1 These words were added by s. 2 (iii) ibid.

2 These words were inserted by s. 2 of the Indian Trusts (Amendment) Act, 1917 (21 of 1917).

3 This word was substituted for the word "Central" by s. 2 and Schedule I of the Repealing and Amending Act, 1925 (37 of 1925).

4 This clause was substituted by s. 2 of the Indian Trusts (Amendment) Act, 1908 (3 of 1908).

(*f*) on any other security expressly authorized by the instrument of trust, or by any rule which the High Court may from time to time prescribe in this behalf:

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*) shall be made without his consent in writing.

Power to purchase redeemable stock at a premium.

[3][20A. (1) A trustee may invest in any of the securities mentioned or referred to in section 20, notwithstanding that the same may be redeemable and that the price exceeds the redemption value.

Provided that a trustee may not purchase at a price exceeding its redemption value any security mentioned or referred to in clauses (*c*) and (*d*) of section 20 which is liable to be redeemed with fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such security as is mentioned or referred to in the said clauses which is liable to be redeemed at par or at some other fixed rate at a price exceeding fifteen per centum above par or such other fixed rate.

(2) A trustee may retain until redemption any redeemable stock, fund or security which may have been purchased in accordance with this section.]

Mortgage of land pledged to Government under Act XXVI of 1871. Deposit in Government Savings Bank.

21. Nothing in section 20 shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immoveable property already pledged as security for an advance under the Land Improvement Act, 1871,3

1 This section was inserted by s. 3 of the Indian Trusts (Amendment) Act, 1916 (1 of 1916).

or, in case the trust-money does not exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

Sale by trustee directed to sell within specified time.

22. Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.

Illustration.

A bequeaths property to B, directing him with all convenient speed and within five years to sell it, and apply the proceeds for the benefit of C. In the exercise of reasonable discrection, B postpones the sale for six years. The sale is not thereby rendered invalid, but C, alleging that he has been injured by the postponement, institutes a suit against B to obtain compensation. In such suit the burden of proving that C has not been injured lies on B.

Liability for breach of trust.

23. Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases :—

(*a*) where he has actually received interest :

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1 See now the Land Improvement Loans Act, 1883 (19 of 1883).

(*b*) where the breach consists in unreasonable delay in paying trust-money to the beneficiary :

(*c*) where the trustee ought to have received interest, but has not done so ;

(*d*) where he may be fairly presumed to have received interest.

He is liable, in case (*a*), to account for the interest actually received, and, in cases (*b*), (*c*) and (*d*), to account for simple interest at the rate of six per cent. per annum, unless the court otherwise directs.

(*e*) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate.

(*f*) Where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment.

Illustrations.

(*a*) A trustee improperly leaves trust-property outstanding, and it is consequently lost ; he is liable to make good the property lost but he is not liable to pay interest thereon.

(*b*) A bequeaths a house to B in trust to sell it and pay the proceeds to C. B neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. B is answerable to C for the loss.

(*c*) A trustee is guilty of unreasonable delay in investing trust-money in accordance with section 20, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(*d*) The duty of the trustee is to invest trust-money in any of the securities mentioned in section 20, clause (*a*), (*b*) (*c*) or (*d*). Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon.

(*e*) The instrument of trust directs the trustee to invest trust-money either in any such securities or on mortgage of immoveable property. The trustee does neither. He is liable for the principal money and interest.

(*f*) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(*g*) Trust-property is invested in one of the securities mentioned in section 20, clause (*a*), (*b*), (*c*) or (*d*). The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(*h*) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of

the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.

No set-off allowed to trustee.

24. A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

Non-liability for co-trustee's default.

25. Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

Non-liablity for co trustee's default.

26. Subject to the provision of sections 13 and 15, one trustee is not, as such, liable for a breach of trust committed by his co-trustee :

Provided that in the absence of as express declaration to the contrary in the instrument of trust, a trustee is so liable—

(*a*) Where he has delivered trust-property to his co-trustee without seeing to its proper application ;

(*b*) Where he allows his co-trustee to receive trust-property and fails to make due inquiry as to the co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require ;

(*c*) Where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

Joining in receipt for conformity

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Several liability of co-trustees.

But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss; and, if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Contribution as between co-trustees.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

28. When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

Non-liability of trustee paying without notice of transfer by beneficiary.

29. When the beneficiary's interest is forfeited or awarded by legal adjudication to Government the trustee is bound to hold the trust-

Liability of trustee where

beneficiary's interest is forfeited to Government.

property to the extent of such interest for the benefit of such person in such manner as the Government may direct in this behalf.

Indemnity of trustees.

30. Subject to the provisions of the instrument of trust and of sections 23 and 26, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive and shall not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

CHAPTER IV.

OF THE RIGHTS AND POWERS OF TRUSTEES.

Right to title-deed.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property.

Right to re-imbursement of expenses.

32. Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses prorperly incurred in or about execution or the realization, preservation or support of the beneficiary.

If he pays such expenses out of his own pocket, he has a first charge upon the trust-property for such expenses and interest thereon ; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is enititled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.

Right to be recouped for erroneous over-payment.

Where a trustee has, by mistake, made an over-payment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled is entited to recover from the beneficiary personally the amount of such over-payment.

Rigt to indemnity from gainer by breach of trust.

33. A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actualy received by such person

under the breach ; and where he is a beneficiary the trustee has a charge on his interest for such amount.

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

Right to apply to court for opinion in management of trust property.

34. Any trustee may, without instituting a suit, apply by petetition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administrations of the trust-property other than questions of detail, difficulty, or importance, not proper in the opinion of the court for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the court to which it is made.

Right to settlement of accounts.

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled ; and where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect.

General authority of trustee.

36. In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the

provisions of section 17, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.

(1* * * * * *)

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

37. Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

Power to sell in lots, and either by public auction or private contract.

38. The trustee making any such sale may insert such reasonable stipulation either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Power to sell under special conditions.
Power to buy in and re-sell.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchases of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Time allowed for selling trust-property.

1 The second paragraph of this section was repealed by the Repealing and Amending Act, 1891 (12 of 1891).

Illustrations.

(*a*) A bequeaths property to B, directing him to sell it with all convenient speed and pay the proceeds to C. This does not render an immediate sale imperative.

(*b*) A bequeaths property to B, directing him to sell it at such time and in such manner as he shall think fit and invest the proceeds for the benefit of C. This does not authorize B, as between him and C, to postpone the sale to an indefinite period.

Power to convey.

39. For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

Power to vary investments.

40. A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of the securities mentioned or referred to in section 20, and from time to time vary any such investment for others of the same nature :

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust-property for his life or for any greater estate, no such change of investment shall be made without his consent in writing.

Power to apply property of minors, etc., for their maintenance, etc.

41. Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the imcome to which he may be entitled in respect of such property ; and such trustee shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time

to time in any of the securities mentioned or referred to in section 20, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen :

Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

Nothing in this section shall be deemed to affect the provision of any local law for the time being in force relating to the persons and property of minors.

Power to give receipts.

42. Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise of any trust or power ; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the applicaton thereof, or being accountable for any loss or misapplication thereof.

Power to compound, etc.

43. Two or more trustees acting together may, if and as they think fit,—

(*a*) accept any composition or any security for any debt or for any property claimed ;

(*b*) allow any time for payment of any debt ;

(*c*) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to trust; and,

(*d*) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangements, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The power conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force.

Power to several trustees of whom one disclaims or dies.

44. When an authority to deal with the trust-property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees,

Suspension of trustee's powers by decree

45. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree, or with the sanction of the court by which the decree has been made, or, where an appeal against the decree is pending, of the Apellate Court.

CHAPTER V

OF THE DISABILITIES OF TRUSTEES.

46. A trustee who has accepted the trust cannot afterwards renounce it except (*a*) with the permission of a principal Civil Court of original jurisdiction, or (*b*) if the beneficiary is competent to contract, with his consent, or (*c*) by virtue of a special power in the instrument of trust.

Trustee cannot renounce after acceptance.

47. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (a) the instrument of trust so provides, or (*b*) the delegation is in the regular course of business, or (*c*) the delegation is necessary, or (*d*) the beneficiary, being competent to contract, consents to the delegation.

Trustee cannot delegate.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

Illustrations.

(*a*) A bequeaths certain property to B and C on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. B dies. C may bequeath the trust-property to D and E upon the trusts of A's will.

(*b*) A is a trustee of certain property with power to sell the same. A may employ an auctioneer to effect the sale.

(*c*) A bequeaths to B fifty houses let at monthly rents in trust to collect the rents and pay them to C. B may employ a proper person to collect these rents.

48. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

Co-trustees cannot act singly.

Control of discretionary power.

49. Where a discretionary power conferred on a trustee is not exercised, reasonable and in good faith, such power may be controlled by a principle Civil Court of original jurisdiction.

Trustee may not charge for services.

50. In the absence of express directions to the contrary contained in the instrument of trust or of a contract to the contrary entered into with the beneficiary or the court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

Nothing in this section applies to any Official Trustee, Administrator General, Public Curator or person holding a certificate of administration.

Trustee may not use trust-property for his own profits.

51. A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

Trustee for sale or his agent may not buy.

52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

Trustee may not buy beneficiary's interest without permission

53 No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

Trustee for purchase.

54. A trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.

Co-trustees may not lend to one of themselves.

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

55. The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

Rights to rents and profits.

56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the exent of the beneficiary's interest;

Right to specific execution.

and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

Right to transfer of possession.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage.

Illustrations.

(*a*) Certain Government Securities are given to trustees upon trust to accumulate the interest until A attains the age of 24, and then to transfer the gross amount to him. A on attaining majority may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(*b*) A bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for B, who has attained his majority and is otherwise competent to contract. B may claim the Rs. 10,000.

(*c*) A transfers certain property to B and directs him to sell or invest it for the benefit of C who is competent to contract. C may elect to take the property in its original character.

Right to inspect and take copies of instrument of trust accounts, etc.

57. The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely of the trust-property, the accounts of the trust-property and vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

Right to transfer beneficial interest.

58. The beneficiary, if competent to contract, may transfer his interest but subject to the law for the time being in force as to the circumstance and extent in and to which he may dispose of such interest :—

Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest nothing in this section shall authorize her to transfer such interest during her marriage.

Right to sue for execution of trust.

59. When no trustees are appointed or all the trustees die, disclaim, or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the court until the appointment of a trustee or new trustee.

Right of proper trustees

60. The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Explanation I.—The following are not proper persons within the meaning of this section

A person domiciled abroad : an alien enemy : a person having an interest inconsistent with that of the beneficiary : a person in insolvent circumstances ; and unless the personal law of the beneficiary allows otherwise, a married woman and a minor.

Explanation II.—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

Illustrations.

(*a*) A, one of several beneficiaries, proves that B, the trustee, has improperly disposed of part of the trust property or that the property is in danger from B's being in insolvent circumstances, or that he is incapacitated from acting as trustee. A may obtain a receiver of the trust-property.

(*b*) A bequeaths certain jewels to B in trust for C. B dies during A's lifetime ; then A dies. C is entitled to have the property conveyed to a trustee for him.

(*c*) A conveys certain property to four trustees in trust for B. Three of the trustees die. B may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(*d*) A conveys certain property to three trustees in trust for B. All the trustees disclaim. B may institute a suit to to have three trustees appointed in place of the trustees so disclaiming.

(*e*) A, trustee for B, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent or compounds with his creditors or suffers a co-trustee to commit a breach of trust. B may institute a suit to have A removed and a new trustee appointed in his room.

Right to compel to any act of duty.

61. The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

Illustrations.

(*a*) A contracts with B to pay him monthly Rs. 100 for the benefit of C. B writes and signs a letter declaring that he will hold in trust for C, the money so to be paid. A fails to pay the money in accordance with his contract. C may compel B on a proper indemnity to allow C to sue on the contract in B's name.

(*b*) A is trustee of certain land, with a power to sell the same and pay the proceeds to B and C equally. A is about to make an improvident sale of the land. B may sue on behalf of himself and C for injunction to restrain A from making the sale.

Wrongful purchase by trustee.

62. Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him

by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property ; and the trustee or purchaser must (*a*) account for the nett profits of the property, (*b*) be charged with an occupation-rent, if he has been in actual possession of the property, and (*c*) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(*a*) impairs the rights of lessees and others who before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser ; or

(*b*) entitles the beneficiary to have the property declared subject to the truste or retransferred where he, being competent to contract, has himself without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

Following trust-property into the hands of third persons; into that into which it has been converted.

63. Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a delaration, that the property is comprised in the trust.

Where the trustee has disposed of trust-property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect

thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Illustrations,

(*a*) A, a trustee for B of Rs. 10,000, wrongfully invests the Rs 10,000 in the purchase of certain land. B is entitled to the land.

(*b*) A, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust-money so misemployed.

Saving of rights of certain transferees

64, Nothing in section 63 entitles the beneficiary to any right in respect of propery in the hands of—

(*a*) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or

(*b*) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.

Nothing in section 63 applies to money, currency notes, and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or liability of a person to whom a debt or charge is transfered.

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Acquisition by trustee of trust property wrongfully converted.

65. Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of [illegible]vening transferees in good faith for

Right in case of blended property.

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Wrongful employment by partner-trustee of trust—propesty for partnership purpose.

67. If a partner, being a trustee, wrongfully employs trust-property in the business, or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations.

(*a*) A and B are partners. A dies, having bequeathed all this property to B in trust for Z, and appinted B his sole executor. B, instead of winding up the affairs of the partnership, retains all the assets in the business. Z may compel him, as partner, to account for so much of the profits as are derived from A's share of the capital. B is also answerable to R for the improper employment of A's assets.

(*b*) A, a trader, bequeaths his property to B in trust for C, appoints B his sole executor, and dies. B enters into partnership with X and Y in the same trade and employs A's assets in the partnership business. B gives an indemnity to X and Y against the claim of C. Here X and Y are jointly liable with B to C as having knowingly become parties to the breach of trust committed by B.

Liability of beneficiary joining in breach of trust.

68. Where one of several beneficiaries—

(a) joins in committing breach of trust, or

(*b*) knowingly obtains any advantage thereform, without the consent of the other beneficiaries, or

(*c*) becomes aware of a breach of trust committed

or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or

(*d*) has deceived the trustee and thereby induced him to commit a breach of trust,

the other benefeciaries are entitled to have all his beneficial interest impounded as against him and all who confiscated claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

Rights and liabilities of beneficiary's transferee.

99. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE.

Office how vacated.

70. The office of a trustee is vacated by his death or by his discharge from his office.

Discharge of trustee.

71. The trustee may be discharged from his office only as follows:—

(*a*) by the extinction of trust;

(*b*) by the completion of his duties under the trust;

(*c*) by such means as may be prescribed by the instrument of trust ;

(*d*) by appointment under this Act of a new trustee in his place ;

(*e*) by consent of himself and the beneficiary, or where there are more beneficiaries than one, all the beneficiaries being competent to contract, or

(*f*) by the court to which a petition for his discharge is presented under this Act.

Petition to be discharged from trust.

62. Notwithstanding the provisions of section 11, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and, if the court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But, where there is no such reason, the court shall not discharge him, unless a proper person can be found to take his place.

Appointment of new trustees on death, etc.

73. Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted dies, or is for a continuous period of six months absent from British India, or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(*a*) the person nominated for that purpose by the instrument of trust (if any), or

(*b*) If there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the court) the retiring trustee, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of the trustees may be increased.

The Official Trustee may, with his consent and by the order of the court, be appointed under this section, in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

Appointment by court.

74. Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under section 73, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the court may appoint a trustee or a new trustee, accordingly.

Rules for selecting new trustees.

In appointing new trustees, the court shall have regard (*a*) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust ; (*b*) to the wishes of the person, if any, empowered to appoint new trustees ; (*c*) to the question whether the appointment will promote or impede the execution of the trust, and (*d*) where there are more beneficiaries than one, to the interests of all such beneficiaries.

Vesting of trust-property in trustees.

75. Whenever any new trustee is appointed under section 73 or section 74, all the trust-property for the time being vested in the surviving or continuing trustees or trustee

or in the legal representative of any trustee, shall become vested in such new trustee either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.

Powers of new trustees.

Every new trustee so appointed, and every trustee appointed by a court, either before or after the passing of this Act, shall have the same powers, authorities and discretion, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Survival of trust.

76. On the death or discharge of one of several co-trustees, the trust survives and the trust property passes to the others, unless the instrument of trust expressly declares otherwise.

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

Trust how extinguished.

77. A trust is extinguished—

(*a*) when its purpose is completely fulfilled ; or

(*b*) when its purpose becomes unlawful ; or

(*c*) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise ; or

(*d*) when the trust, being revocable, is expressly revoked.

Revocation of trust.

78. A trust created by will may be revoked at the pleasure of the testator.

A trust otherwise created can be revoked only—

(*a*) where all the beneficiaries are competent to contract—by their consent ;

(*b*) where the trust has been declared by a non-testamentary instrument or by word of mouth —in exercise of a power of revocation expressly reserved to the author of the trust ; or

(*c*) where the trust is for payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

Illustration.

A conveys property to B in trust to sell the same and pay out of the proceeds the claims of A's creditors. A reserves no power of revocation. If no communication has been made to the creditors, A may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

Revocation not to defeat what trustees have duly done

79. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustee may have duly done in execution of the trust.

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS

Where obligation in nature of trust is created.

80. An obligation in the nature of a trust is created in the following cases.

Where it does not appear that transferor intended to dispose of beneficial interest.

81. Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

Illustrations.

(*a*) A conveys land to B without consideration and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made be inferred that A intended to transfer the beneficial interest in the land. B holds the land for the benefit of A.

(*b*) A conveys to B two fields Y and Z, and declares a trust of Y, but says nothing about Z. It cannot consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in Z. B holds Z for the benefit of A.

(*c*) A transfers certain stock belonging to him into the joint names of himself and B. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the stock during his life. A and B hold the stock for the benefit of A during his life.

(d) A makes a gift of certain land to his wife B. She takes the beneficial interest in the land free from any trust in favour of A, for it may be inferred from the circumstances that the gift was for B's benefit.

Transfer to one for consideration paid by another.

82. Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect Code of Civil Procedure,[1] section 317, or Act No. XI of 1859[2] (*to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency*), section 36.

Trust incapable of execution or executed without exhausting trust property

83. Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee in the absence of direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Illustrations.

(a) A conveys certain land to B—

"upon trust," and no trust is declared ; or

"upon trust to be thereafter declared" and no such declaration is ever made ; or

upon trusts that are too vague to be executed ; or

upon trusts that become incapable of taking effect ; or

1 See now Act 5 of 1908. 2 Ben. Code.

"in trust for C," and C renounces his interest under the trust.

In each of these cases B holds the land for the benefit of A.

(*b*) A transfers Rs. 10,000 in the four per cent. to B, in trust to pay the interest annually accruing due to C for her life. A dies. Then C dies. B holds the fund for the benefit of A's legal representative.

(*c*) A conveys land to B upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. B sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. B holds the first moiety and the part unapplied of the second moiety for the benefit of A or his legal representative.

(*d*) A bequeaths Rs. 10,000 to B, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. B holds for the benefit of A's legal representative the undisposed of interest in the money or land if purchased.

Transfer for illegal purpose

84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

Bequest for illegal purpose.

85. Where a testator bequeaths certain property upon trust and purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee

agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest of which revocation is prevented by coercion.

Where property is bequeathed and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

Transfer pursuant to rescindable contract

86. Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

Debtor becoming creditor's representative.

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the person interested therein.

Advantage gained by fiduciary

88. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Illustrations.

(*a*) A, an executor, buys at an undervalue from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit of B the difference between the price and value.

(*b*) A, a trustee, uses the trust-property for the purpose of his own business. A holds for the benefit of his beneficiary the profits arising from such user.

(*c*) A, a trustee, retires from his trust in consideration of his successor paying him a sum of money. A holds such money for the benefit of his beneficiary.

(*d*) A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.

(*e*) A, a partner, employed on behalf of himself and his co-partners in negotiating the terms of the lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. A holds the lakh for the benefit of the partnership.

(*f*) A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for profits arising from A's share of the capital.

(*g*) A, an agent, employed to obtain a lease for B, obtains the lease for himself. A holds the lease to the benefit of B.

(*h*) A, a guardian, buys up for himself incumbrances on his ward B's estate at an undervalue. A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid.

Advantage gained by exercise of undue influence.

89. Where by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold

the advantage for the benefit of the person whose interests have been so prejudiced.

Advantage gained by qualified owner.

90. Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such person of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

Illustrations.

(*a*) A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.

(*b*) A village belongs to a Hindu family. A, one of its members, pays nazrana to Government and thereby procures his name to be entered as the inamdar of the village. A holds the village for the benefit of himself and the other members.

(*c*) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

Property acquired with notice of existing contract.

91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Purchase by person contracting to buy property to be held on trust.

92. Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the cantract.

Advantage secretly gained by one of several compounding creditors.

93. Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

Constructive trust in cases not expressly provided for.

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he holds the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

Illustrations.

(*a*). A, an executor, distributes the assets of his testator B to the legatees without having paid the whole of B's debts. The legatees hold for the benefit of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(*b*) A by mistake assumes the character of a trustee for B and under colour of the trust receives certain money. B may compel him to account for such moneys.

(*c*) A makes a gift of a lakh of rupees to B, reserving to himself, with B's assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000, and B holds that sum for the benefit of A.

Obligor's duties, liabilities and disabilities.

95. The person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Provided that (*a*) where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment; and (*b*) where he holds the property by virtue of a contract with a person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the court, buy or become lessee or mortgagee of the property or any part thereof.

Saving of rights of bona fide purchasers.

96. Nothing contained in this Chapter shall impair the rights of transferees in good faith for consideration, or create an obligation in evasion of any law for the time being in force.

THE SCHEDULE

STATUTE.

Year and Chapter.	Short Title.	Extent of repeal,
29 Car. II, c 3 ...	The Statute of frauds.	Sections 7, 8, 9, 10 and 11.

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and Year.	Short Title.	Extent of repeal.
XXVIII of 1866 ...	The Trustees' and Mortgagees' Powers Act, 1866.	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36 and 37. In section * *1 43 the word "trustee" wherever it occurs; and in section 43 the words "management or" and "the trust property or."
I of 1877 ...	The Specific Relief Act 1877.	In section 12 the first illustration.

1 The figures "39" and by implication the word "and" also, were repealed by the Repealing and amending Act, 1891 (12 of 1891). See the First Schedule.

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